

No. 84-6811

Supreme Court, U.S.  
**FILED**  
**AUG 26 1986**  
JOSEPH F. SPANIOLO, JR.  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1986

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WARREN MCCLESKEY, PETITIONER

*v.*

RALPH M. KEMP, Superintendent, Georgia Diagnostic  
& Classification Center

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**On Writ of Certiorari to the United States  
Court of Appeals for the Eleventh Circuit**

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**JOINT APPENDIX**

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PETITION FOR CERTIORARI FILED MAY 28, 1985  
CERTIORARI GRANTED JULY 7, 1986

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## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Entry
December 30, 1981	Petition for Writ of Habeas Corpus filed in the United States District Court for the Northern District of Georgia, Atlanta Division in <i>McCleskey v. Zant</i> , No. C81-2434A
December 30, 1981	Order of the District Court, staying execution of petitioner's death sentence
June 10, 1982	Order of the District Court, denying motion for an evidentiary hearing and dismissing the petition
June 10, 1982	Judgment of the District Court, dismissing the petition without prejudice
June 18, 1982	Petitioner's motion to alter or amend the judgment
June 25, 1982	Petitioner's supplement to motion, annexing affidavit of Professor David C. Baldus
October 8, 1982	Order of the District Court, granting in part and denying in part petitioner's motion to alter or amend the judgment
November 18, 1982	Respondent's motion for discovery
April 1, 1983	Order of the District Court extending time for discovery
April 7, 1983	Petitioner's motion for discovery
May 2, 1983	Response to petitioner's motion for discovery
June 3, 1983	Order of the District Court, granting in part and denying in part petitioner's motion for discovery
June 24, 1983	Order of the District Court, granting further discovery

Date	Entry
July 21, 1983	Petitioner's motion to compel
July 26, 1983	Opposition to motion to compel
July 29, 1983	Pretrial conference
August 5, 1983	Order of the District Court respecting discovery
August 8-22, 1983	Evidentiary hearing before Hon. J. Owen Forrester
October 17, 1983	Further evidentiary hearing
February 2, 1984	Order of the District Court, granting habeas corpus relief
February 2, 1984	Judgment of the District Court
February 24, 1984	Respondent's notice of appeal
February 28, 1984	Petitioner's notice of cross-appeal
March 12, 1984	Order of the District Court, granting petitioner's certificate of probable cause to appeal
March 28, 1984	Order of the United States Court of Appeals for the Eleventh Circuit, directing the appeal to be heard initially <i>en banc</i>
June 12, 1984	Oral argument before the United States Court of Appeals
January 29, 1985	Opinion of the United States Court of Appeals
April 2, 1985	Order of the United States Court of Appeals, staying mandate
May 28, 1985	Petition for writ of certiorari filed
July 7, 1986	Certiorari granted

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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Civil Action No. C81-2434A

WARREN McCLESKEY, PETITIONER

—vs—

WALTER ZANT, Warden, Georgia Diagnostic  
and Classification Center, RESPONDENT

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**PETITION FOR WRIT OF HABEAS CORPUS  
BY A PERSON IN STATE CUSTODY**

To the Honorable Judge of the United States District Court for the Northern District of Georgia, Atlanta Division:

Preliminary Explanation: The allegations of this petition are in the form dictated by the Model Form for Use in Applications for Habeas Corpus under 28 U.S.C. § 2254, prescribed by the Rules Governing Section 2254 Cases in the United States District Courts.

Paragraphs 1 through 11 state the history of the prior state court proceedings; paragraphs 12 through 14 summarize briefly the facts of the case; paragraphs 15 through 97 state the petitioner's federal constitutional claims; paragraphs 98 through 102 contain required technical information.

1. The name and location of the court which entered the judgment of conviction and sentence under attack are:

- (a) Superior Court of Fulton County  
Fulton County, Georgia

2. The date of the judgment of conviction and sentence is October 12, 1978.

3. The sentence is that petitioner be put to death by electrocution, and that he serve life sentences on the armed robbery convictions.

4. The nature of the offense involved is that petitioner was convicted of one count of malice murder and two counts of armed robbery.

5. At his trial, petitioner entered a plea of not guilty.

6. The trial of the issues of guilt or innocence and of sentence was had before a jury.

7. Petitioner did testify during the guilt/innocence phase of the trial of his case.

8. Petitioner appealed his conviction and sentence of death.

9. The facts of petitioner's appeal are as follows:

(a) The Supreme Court of Georgia affirmed petitioner's conviction and sentence on January 24, 1980. *McCleskey v. The State*, 245 Ga. 108 (1980).

(b) On October 6, 1980, the Supreme Court of the United States denied a timely petition for a writ of certiorari. *McCleskey v. The State*, — U.S. —, 66 L.Ed.2d 119-20 (1980).

10. Other than the appeal described in paragraphs 8 and 9 above, the only petitions, applications, motions or proceedings filed or maintained by petitioner with respect to the October 12, 1978 judgment of the Superior Court of Fulton County are those described in paragraph 11 below.

11. (a) On December 19, 1980, petitioner filed an extraordinary motion for new trial in the Superior Court of Fulton County. No hearing has ever been held on said motion.

(b) On January 5, 1981, pursuant to Georgia Code Ann. § 50-127, petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County. A hearing was held on the petition on January 20, 1981.



Petitioner's motion for funds to provide for expert witnesses was denied, and examination of witnesses was conducted without the benefit of statements in the prosecutor's files, as the habeas court did not require the attendance of the prosecutor, or a representative from the prosecutor's office, at the hearing itself. On April 8, 1981, the Superior Court of Butts County denied all relief sought.

(c) On June 17, 1981, the Supreme Court of Georgia denied the petitioner's application for a Certificate of Probable Cause to Appeal the decision of the Superior Court of Butts County.

(d) On November 30, 1981, the Supreme Court of the United States denied a timely petition for a writ of certiorari to the Superior Court of Butts County. *McCleskey v. Zant*, — U.S. —, 50 U.S.L.W. 3448 (1981).

12. Petitioner was convicted and sentenced in violation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, for each of the reasons set forth below.

## I. INTRODUCTORY FACTS

13. Warren McCleskey was tried and convicted for the murder of Frank Schlatt on May 13, 1978.

14. The Supreme Court of Georgia found that the jury was authorized to find the following facts:

On the morning of May 13, 1978, appellant, using his car, picked up Ben Wright, Bernard Dupree and David Burney. All four had planned to rob a jewelry store in Marietta that day. After Ben Wright went into the store to check it out, they decided not to rob it. All four then rode around Marietta looking for another place to rob but couldn't find anything suitable. They drove to Atlanta and decided on the Dixie Furniture Store as a target. Each of the four was armed. Appellant had a .38 caliber Rossi nickel-plated revolver, Ben Wright carried a sawed-off shot-

gun, and the two others had blue steel pistols. Appellant parked his car up the street from the furniture store, entered the store, and "cased" it. After appellant returned to the car, the robbery was planned. Executing the plan, appellant entered the front of the store and the other three came through the rear by the loading dock. Appellant secured the front of the store. The others rounded up the employees in the rear and began to tie them up with tape. All the employees were forced to lie on the floor. The manager was forced at gunpoint to turn over the store receipts, his watch and six dollars. George Malcom, an employee, had a pistol taken from him at gunpoint. Before all the employees were tied up, Officer Frank Schlatt, answering a silent alarm, pulled his patrol car up in front of the building. He entered the front door and proceeded approximately fifteen feet down the center aisle where he was shot twice, once in the face and once in the chest. The chest shot glanced off a pocket lighter and lodged in a sofa. That bullet was recovered. The head wound was fatal. The robbers fled. Sometime later, appellant was arrested in Cobb County in connection with another armed robbery. He confessed to the Dixie Furniture Store robbery, but denied the shooting. Ballistics showed that Officer Schlatt had been shot by a .38 caliber Rossi revolver. The weapon was never recovered but it was shown that the appellant had stolen such a revolver in the robbery of a Red Dot grocery store two months earlier. Appellant admitted the shooting to a co-defendant and also to a jail inmate in the cell next to his, both of whom testified for the state.

## II. GROUNDS OF CONSTITUTIONAL INVALIDITY OF PETITIONER'S CONVICTION AND SENTENCE

### (A) *Failure To Disclose Understanding With Key Prosecution Witness.*

15. The State's deliberate failure to disclose an agreement or understanding between the State and the jail inmate, Offie Evans, who testified at petitioner's trial, that a favorable recommendation regarding a pending federal escape charge would be made in exchange for his testimony violated the due process clause of the Fourteenth Amendment.

*Facts supporting petitioner's claims that the State failed to disclose an agreement or understanding with key prosecution witness*

16. As the Georgia Supreme Court decision indicates, the State's evidence showing that petitioner was the triggerman in the shooting of Frank Schlatt included testimony from a jail inmate, Offie Gene Evans, to the effect that petitioner had confessed the shooting.

17. At petitioner's trial, the prosecution elicited from the inmate testimony that the prosecutor had not promised him anything for his testimony. (Tr. 868).\*

18. No testimony from the inmate was elicited regarding an agreement or understanding between the inmate and Atlanta Police detectives investigating the Schlatt killing. (Tr. 865-71).

19. An agreement or understanding existed between the inmate, Offie Gene Evans, and Atlanta Police Bureau detectives, to the effect that Bureau detectives would recommend favorable disposition of his pending federal

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\* All references to the transcript of the trial held in the Superior Court of Fulton County will be prefaced with the abbreviation "Tr." References to the transcript of the habeas corpus hearing in Butts County Superior Court will be prefaced with the abbreviation "Habeas Tr."

escape charges in exchange for his testimony in petitioner's trial. (Habeas Tr. 122).

(B) *Trial Court's Failure to Permit Petitioner To Proceed In Forma Pauperis And To Provide Funds For Employment of Expert Witnesses and Investigators Contravened Petitioner's Due Process Rights Assured By The Fourteenth Amendment.*

20. The Trial Court's failure to permit petitioner to proceed in forma pauperis and to provide funds for employment of expert witnesses and investigators contravened petitioner's due process rights assured by the Fourteenth Amendment.

*Facts supporting petitioner's claim that trial court's failure to permit him to proceed in forma pauperis and to provide funds for employment of expert witnesses and investigators contravened petitioner's due process rights assured by the fourteenth amendment.*

21. In the trial court, petitioner moved to proceed in forma pauperis, and for funds for expert witnesses and an investigator. The trial court failed to act favorably upon petitioner's motions.

22. Among the factual grounds cited by petitioner for his motion was the State's reliance upon "numerous experts, including pathologist, criminologist, criminal investigators, ballistic experts, and others . . . ."

23. As noted by the Supreme Court of Georgia, the State relied for its' proof against petitioner on a ballistics expert's testimony that the murder weapon was a .38 caliber Rossi. The murder weapon was not recovered, however.

24. The State's own ballistics expert testified subsequently that there were significant chances that the murder weapon was something other than a .38 Rossi. (Fite Deposition, pp. 4-7).\*

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\* Fite's deposition is a part of the state habeas corpus proceeding.

25. Had petitioner been granted funds for the retention of his own ballistics expert, the expert evidence not presented to the jury could have been presented.

26. Less than three weeks prior to trial, the State listed more than 100 potential witnesses which it might call at trial. Of these, 23 testified at trial, and none were interviewed by defense counsel except the three who testified at the preliminary hearing. (H. Tr. 33-37).

27. Among the witnesses who were never interviewed by defense counsel and who were not called by the State were three witnesses whose testimony would have contradicted the State's theory that only one of the parties to the crime was physically situated at the time of the shooting such as to shoot the victim.

28. The failure to provide petitioner with funds for the employment of a ballistics expert, and an investigator, substantially and materially prejudiced the petitioner's opportunity to present his defense.

(C) *The Court's Charge Regarding Presumptions Contravened The Due Process Clause Of The Fourteenth Amendment*

29. The trial court's charge to the jury regarding presumptions of intent contravened petitioner's due process rights under the Fourteenth Amendment.

*Facts supporting petitioner's claims that the trial court's instructions regarding presumptions of intent contravened his due process rights.*

30. The trial court instructed the jury that it could return a verdict on guilty or not guilty on both malice murder and felony murder statutes. (Tr. 999-1000). The jury returned a verdict of guilty on malice murder. (Tr. 1010).

31. The trial court instructed the jury as follows regarding presumptions relating to intent as an element of malice murder:



Now, in every criminal prosecution, ladies and gentlemen, criminal intent is a necessary and material ingredient thereof. To put it differently, a criminal intent is a material and necessary ingredient in any criminal prosecution.

I will now try to explain what the law means by criminal intent by reading you two sections of the criminal code dealing with intent, and I will tell you how the last section applies to you, the jury.

One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.

I charge you, however, that a person will not be presumed to act with criminal intention, but the second code section says that the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Now, that second code section I have read you has the term the trier of facts. In this case, ladies and gentlemen, you are the trier of facts, and therefore it is for you, the jury, to determine the questions of facts solely from your determination as to whether there was a criminal intention on the part of the defendant, considering the facts and circumstances as disclosed by the evidence and deductions which might reasonably be drawn from those facts and circumstances.

Now, the offense charged in Count One of the indictment is murder, and I will charge you what the law says about murder.

I charge you that a person commits murder when he unlawfully and with malice aforethought, either

express or implied, causes the death of another human being. Express malice is that deliberate intention to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. That is the language of the law, ladies and gentlemen.

I charge you that legal malice is not necessarily ill-will or hatred. It is the intention to unlawfully kill a human being without justification or mitigation, which intention, however, must exist at the time of the killing as alleged, but it is not necessary for that intention to have existed for any length of time before the killing.

In legal contemplation, a man may form the intention to kill a human being, do the killing instantly thereafter, and regret the deed as soon as it is done. In other words, murder is the intentional killing of a human being without justification or mitigation.

(Tr. 996-999).

32. At the request of the jury during deliberations, the trial court repeated its instructions regarding the elements of malice murder. (Tr. 1007-1008).

(D) *Trial Court's Instructions Regarding The Use Of Evidence Of Other Alleged Acts Of Criminal Conduct For Proof Of Intent To Commit Murder Contravened The Due Process Clause Of The Fourteenth Amendment.*

33. The trial court's instructions to the jury, that they could consider evidence that petitioner had been engaged in other robberies, none of which resulted in the killing of any person, as proof of intent, contravened the petitioner's due process rights under the Fourteenth Amendment.

*Facts supporting petitioner's contentions that the trial court's instructions regarding use of evidence regarding other robberies as proof of intent to murder contravened petitioners' due process rights.*

34. At trial, the prosecution offered into evidence for the purpose of showing petitioner's identity, testimony regarding a robbery which occurred six weeks prior to the shooting of Frank Schlatt. (Tr. 667, 676, et seq.).

35. The trial court instructed the jury that the evidence could be used, inter alia, for proof of intent:

"Ladies and Gentlemen, in the prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused, that is, the defendant in this case, has committed another transaction, wholly distinct, independent and separate from that for which he is on trial, even though it may show a transaction of the same nature, with similar methods, in similar locations, it is admitted into evidence for the limited purpose of aiding in identification and illustrating the state of mind, plan, motive, intent and scheme of the accused, if, in fact, it does to the jury illustrate those matters.

Now, whether or not the defendant was involved in such similar transaction is a matter for you to determine, and the Court makes no intimation in that regard.

Furthermore, if you conclude that the defendant now on trial was involved in a similar transaction or these similar transactions, you should consider it solely with reference to the mental state and intent of the defendant insofar as applicable to the charges in the indictment, and the Court in charging you this principle of law in no way intimates whether such transaction, if any, tends to illustrate the intent or state of mind of the defendant. That is a question for the jury to determine, but this



evidence is admitted for the limited purpose mentioned by the Court, and you will consider it for no other purpose except the purpose for which it is admitted.

(Tr. 673-74).

36. This overly-broad instruction permitted the jury to use the evidence of other criminal acts as evidence of intent to commit murder, even though no murder occurred in the other robbery. The overly-broad instruction contravened petitioner's due process rights.

(E) *Trial Court's Instructions At Sentencing Phase Gave Jury Unlimited Discretion Regarding Use Of Evidence Of Other Robberies, In Contravention Of The Eighth And Fourteenth Amendments.*

37. The Trial court's instructions at the sentencing phase, which gave the jury unlimited discretion regarding the use of evidence of other robberies, contravened the Eighth and Fourteenth Amendments.

*Facts in support of petitioner's claim that the trial court's instructions at the sentencing phase of the trial gave the jury unlimited discretion regarding their use of evidence of other robberies, in contravention of the Eighth and Fourteenth Amendments.*

38. At the sentencing phase of petitioner's trial, the trial court gave the jury the following instruction:

In arriving at your determination of which penalty shall be imposed, you are authorized to consider all the evidence received here in court, presented by the State and the defendant throughout the trial before you.

(Tr. 1028).

39. No other instruction was given the jury regarding its use of the evidence of other alleged robberies which had been introduced.

40. No other instruction was given regarding the degree of proof required, nor what weight, if any, might be attached to the evidence regarding other robberies.

41. The absence of instructions left the jury with unguided discretion regarding the use of the evidence of other alleged robberies, in contravention of the Eighth and Fourteenth Amendments.

(F) *Introduction Of Evidence Of Other Alleged Acts Of Criminal Conduct, Without Requisite Safeguards, Contravened The Eighth And Fourteenth Amendments.*

42. At trial, the trial court permitted the introduction of evidence regarding other alleged robberies—once at the prosecutor's suggestion that such would help identify the petitioner as present at the shooting of Frank Schlatt, and subsequently for impeachment purposes. (Tr. 667, 676, 884, 805A, Exhibits S-32 through S-35; Tr. 848-49).

43. The trial court permitted the introduction of such evidence without imposing any of the following safeguards:

- (a) that the State make a clear showing of the probative value of the evidence to an element of the crime charges;
- (b) that the evidence not be admitted when duplicative of other evidence going to the same element of the crime;
- (c) when offered to show the identity of the perpetrator of the crime, the State must show a high degree of similarity between the other criminal conduct and the act being tried;
- (d) that the State must prove criminal conduct with respect to other alleged criminal act by the defendant by clear and convincing evidence, or beyond a reasonable doubt.

44. The failure to require any such safeguards, and the failure to instruct the jury with respect to any such

safeguards, contravened the due process clause of the Fourteenth Amendment.

(G) *The Death Penalty, As Applied.*

45. The death penalty is in fact administered and applied arbitrarily, capriciously, and whimsically in the State of Georgia, and petitioner was sentenced to die and will be executed, pursuant to a pattern of wholly arbitrary and capricious infliction of that penalty in violation of his rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

*Facts supporting petitioner's claim that the death penalty is in fact administered arbitrarily, capriciously and whimsically in the State of Georgia.*

46. The Supreme Court of the United States upheld the Georgia capital punishment statutes "[o]n their face" only upon the assumption that the procedures mandated by the statutes would assure that sentences of death are not wantonly or freakishly imposed. *Gregg v. Georgia*, 428 U.S. 153, 198 (1976). As those statutes have been applied, however, death sentences in Georgia have in fact been imposed in an arbitrary and capricious manner.

47. Georgia cases similar to that of petitioner in many respects, including both the nature and circumstances of the offense, the age, prior record, relative culpability, and life and character of the accused have resulted in lesser punishments than death.

48. Georgia cases more aggravated than that of petitioner in many respects, including both the nature and circumstances of the offense and the age, prior record, relative culpability, and life and character of the accused have resulted in lesser punishments than death.

49. There is no rational, constitutionally permissible way of distinguishing the few cases in which the death penalty has been imposed from the many cases in which it has not been imposed.

50. The evidence shows, for example, that the death penalty has rarely been imposed upon persons accused, like the petitioner, of shooting an Atlanta police officer during the course of his duties. (Habeas Hearing, Exh. P-1).

(H) *Death Penalty Is Being Imposed Upon Grounds Which Are Discriminatory On The Basis of Race, Sex and Poverty.*

51. The death penalty is imposed in this case pursuant to a pattern and practice of Georgia prosecuting attorneys, courts, juries and governors to discriminate on the grounds of race, sex and poverty in the administration of capital punishment. For these reasons, the imposition and execution of petitioner's death sentence under Georgia law and practice violates the Eighth Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

*Facts supporting petitioner's claim that death penalty is imposed discriminatorily on the basis of race, sex and poverty.*

52. Just as in the period prior to the Supreme Court's decision in *Furman v. Georgia*, the pattern of jury imposition of the death penalty is clear—black killers and the killers of white persons are substantially more likely to receive a death sentence than others. There is little statistical likelihood that these patterns would have occurred randomly or by chance.

53. Petitioner's death sentence was imposed pursuant to this pattern of racial, economic and sexual discrimination. The only accused killers of Atlanta police officers to receive the death penalty during the period from 1960 to the present have been black persons convicted of killing white officers.

(I) *Failure To Serve Rational Interests.*

54. The theoretical justifications for capital punishment are groundless and irrational in fact, and death is thus an excessive penalty which fails factually to serve any rational and legitimate social interests that can justify its unique harshness, in violation of petitioner's rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

*Facts supporting petitioner's claim that the theoretical justifications for capital punishment are groundless in fact.*

55. The death penalty provided by Georgia law violates the principle that a criminal sanction "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

56. Executions do not have an identifiable deterrent effect. As the Georgia State Department of Offender Rehabilitation acknowledged in a November, 1972 study entitled *Capital Punishment in Georgia: An Empirical Study 1943-1965*, "Despite the fact that Georgia used the death penalty more often than any other state in the country, its homicide rate was also the highest in the nation. *This suggests that the death penalty is not effective as a deterrent.*" Study at 451 (emphasis added).

57. Executions set socially sanctioned examples of, and provide an inducement to, violence.

58. Public sentiment for retribution is not so strong as to justify the use of the death penalty.

59. There is no penal purpose served by execution which is not more effectively or efficiently served by life imprisonment.

(J) *Cruel And Unusual In Light Of Circumstances.*

60. Petitioner's punishment is cruel and unusual in consideration of all factors relating to the offense and the



offender, including mitigating circumstances. For this reason, the imposition and execution of his death sentence violates petitioner's rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

*Facts supporting petitioner's claim that his punishment is cruel and unusual in consideration of all the factors relating to the offense and the offender, including mitigating circumstances.*

61. The death penalty was imposed in this case although the evidence showed that the shooting occurred without infliction of any physical or mental torture; petitioner had never previously been accused of discharging a weapon against another and the death penalty has been rarely imposed for the shooting of an Atlanta police officer during the course of his duty.

(K) *Georgia Supreme Court's Appellate Review Has Failed To Assure That Death Penalty Was Not Imposed In An Arbitrary And Capricious Manner, Contrary To The Eighth And Fourteenth Amendments.*

62. The Georgia Supreme Court's appellate review has failed to assure that the death penalty imposed in this case was not imposed in an arbitrary and capricious manner, contrary to the Eighth and Fourteenth Amendments.

*Facts in support of claim that Georgia Supreme Court Appellate Review fails to meet constitutional standards.*

63. Of the thirteen cases reviewed by the Georgia Supreme Court and relied upon by that court as a basis for concluding that the death penalty was not arbitrarily and capriciously imposed in petitioner's case, four cases were cases wherein the death penalty was subsequently overturned because it had been imposed pursuant to the

arbitrary and capricious manner condemned in *Furman v. Georgia*. [*Johnson v. State*, 226 Ga. 378 (1970); *Callahan v. State*, 229 Ga. 737 (1972); *Whitlock v. State*, 230 Ga. 700 (1973) and *Bennett v. State*, 231 Ga. 458 (1973)].

64. Of the remaining cases, most involved cases distinguishing them from the routine murder case in which the death penalty had not been imposed. For example, in at least three cases relied upon by the Georgia Supreme Court, the victim was shot while fleeing from the scene. *Fleming v. State*, 240 Ga. 142 (1977); *Willis v. State*, 243 Ga. 185 (1979); *Collier v. State*, 244 Ga. 553 (1979). No such accusation was made against petitioner.

65. In another case relied upon by the Supreme Court to find non-arbitrariness, one victim's skull was beaten in and a butcher knife was buried deep in her chest, while a second victim, a woman suffering partial paralysis from a stroke, was injured and left alone, where police found her days later. *Bowden v. State*, 239 Ga. 821 (1977). No such accusations were made against petitioner herein.

66. *Pulliam v. State*, 236 Ga. 460 (1976), also relied upon by the Supreme Court as evidencing non-arbitrariness, involved the shooting of a cab driver during a premeditated robbery scheme that included express plans to shoot the driver. No such allegations were made against petitioner herein.

67. *Dobbs v. State*, 236 Ga. 427 (1976) involved the murder of a grocery store operator who was shot while he lay helpless on the floor, with a witness begging that he be spared. No such allegations were made against petitioner herein.

68. Finally, *Callahan v. State*, 229 Ga. 737 (1972) (a case wherein the death sentence was overturned as imposed pursuant to an arbitrary and capricious scheme) involved the murder of an Atlanta Police officer who was stomped unconscious prior to the shooting.

69. All of the cases relied upon by the Georgia Supreme Court for a showing of non-arbitrariness involved

facts of substantially greater brutality or torture than in petitioner's case—indeed, there was no evidence whatsoever of brutality or torture in petitioner's case.

(L) *Prosecutor's Impermissible Arguments To Jurors During Sentencing Phase Regarding Appellate Processes Contravened Petitioner's Sixth and Fourteenth Amendment Rights.*

70. The Prosecutor's arguments to the jury during the sentencing phase of petitioner's trial contravened petitioner's Sixth and Fourteenth Amendment rights.

71. At the sentencing phase of the trial, the prosecutor, in seeking the death penalty, made an impermissible reference to the appellate court process in asking the jury to impose the death sentence, as opposed to life imprisonment.

The prosecutor argued:

Ladies and Gentlemen, this is the sentencing phase of this trial, and I expect the Court is going to charge you with a couple of points, that you can return a verdict of life in prison or you can return a verdict of death . . . (Tr. 1016). If you find a sentence for this man of life for murder, if you sentence him to life for armed robbery, and if you don't specify how these are to run, they are going to run together . . . (Tr. 1017).

Now, what should you consider as you are deliberating the second time here, and I don't know what you are going to consider. I would ask you, however, to consider several things . . . .

I would also ask you to consider the prior convictions that you have had with you in the jury room, and particularly the one where he got three convictions. I believe if you look at those papers carefully you are going to find, I think, on one of those he got three life sentences to begin with, and then there is



a cover sheet where apparently that was reduced to what, eighteen years, or fifteen years or something, which means, of course, he went through the appellate process and somehow got it reduced.

Now, I ask you to consider that in conjunction with the life that he has set for himself.

(Tr. 1019-1020).

(M) *Admission Of Testimony Tainted By Improper Lineup Procedure Contravened Petitioner's Sixth and Fourteenth Amendment Rights.*

72. The display of petitioner, in a highly suggestive situation in the jury box on the morning of petitioner's trial, without advice of counsel, and the subsequent introduction of testimony of three witnesses who had not previously been able to identify petitioner contravened petitioner's Sixth and Fourteenth Amendment rights.

*Facts supporting petitioner's claim regarding improper lineup procedure resulting in violation of Sixth and Fourteenth Amendment rights.*

73. Without any advance notice to petitioner or petitioner's counsel, the State displayed the petitioner in a highly suggestive situation in the jury box with four or five other persons the morning of petitioner's trial.

74. At least three witnesses (Classie Barnwell, Paul Ross and Dorothy Umberger) who had not previously identified petitioner as at the scene of one or more robberies to which they testified at petitioner's trial, identified him subsequent to the display in the jury box.

75. Petitioner was the only light-skinned defendant in the jury box the morning of the trial. (Tr. 737).

76. Some of the witnesses had had very slight opportunity to view the petitioner at the time of the robberies.

77. The trial court erred in admitting the testimony which had been tainted by the pre-trial identification procedure.

(N) *Introduction Of Petitioner's Involuntary Statement Contravened Petitioner's Fifth, Sixth And Fourteenth Amendment Rights.*

78. The introduction of petitioner's custodial statement to police officers, made involuntary and without a free and knowing waiver of petitioner's rights, contravened the Fifth, Sixth and Fourteenth Amendments.

*Facts in support of petitioner's claim that introduction of statement contravened his constitutional rights.*

79. The trial court permitted the introduction into evidence of testimony regarding a statement made by petitioner to Atlanta Police Bureau detectives. (Trial Tr. 506, et seq.).

80. The statement by petitioner was involuntarily made and should not have been introduced.

81. The statement was induced by threats of violence made to petitioner shortly before the statement was given.

(O) *Exclusion Of Two Prospective Jurors Without Sufficient Examination Of Their Views Regarding Capital Punishment Was Constitutional Error.*

82. The trial court improperly excused two prospective jurors without adequate examination of their views regarding capital punishment in contravention of petitioner's Sixth, Eighth and Fourteenth Amendment rights.

*Facts in support of petitioner's contention that trial court exclusion of two prospective jurors without adequate examination of their views on capital punishment contravened petitioner's rights.*

83. The trial court excluded two prospective jurors after a brief examination of their views regarding the death penalty. (Tr. 96-99, 128-30).

84. No inquiry was made prior to exclusion of the two jurors regarding their ability or inability to set their

convictions aside and do their duty as a citizen; nor were they asked what effect the State's request for the death penalty might have upon their deliberations regarding guilt.

85. The Court made no inquiry regarding whether their views regarding the death penalty would affect their ability to abide by their oath as jurors.

86. The evidence upon which the Court excluded the jurors was inadequate, and the Court's failure to make further inquiry before excluding both was error.

*(P) Petitioner Was Denied The Effective Assistance Of Counsel In Contravention Of The Sixth And Fourteenth Amendments.*

87. Petitioner's trial counsel's failure to take a number of necessary steps prior to, during and after petitioner's trial constituted ineffective assistance of counsel in contravention of petitioner's Sixth and Fourteenth Amendment rights.

*Facts in support of petitioner's ineffective assistance of counsel claim.*

88. Among the actions, and failures to act, which constitute ineffective assistance of counsel are the following:

(a) Counsel's failure to interview a single witness prior to trial;

(b) Counsel's failure to secure the testimony of witnesses who would have given testimony in support of either of the two defenses which defense counsel recognized were available to defendant;

(c) Counsel's failure to develop expert testimony regarding the identity of the murder weapon;

(d) Counsel's failure to examine the prosecutor's investigative file until the eve of trial;

(e) At trial, counsel failed to object to trial court instructions which were contrary to Supreme Court standards;

(f) Counsel's failure to object to the District Attorney's argument to the jury which directed the jury's attention to the appellate processes wherein life sentences had been reduced to 15 or 18 years;

(g) Counsel's failure to develop on cross-examination of one of the State's key witnesses testimony regarding promises made to him by Atlanta police detectives regarding favorable recommendations which would be made in exchange for his testimony;

(h) Counsel's failures to move for a continuance or mistrial when he was taken by surprise regarding the pretrial lineup procedure conducted in the courtroom the morning of trial;

(i) Counsel's failure to prepare for the sentencing phase of the trial;

(j) Counsel's failure to develop testimony regarding petitioner's life history which could have been considered by the jury in mitigation of the guilt finding;

(k) Counsel's failure to respond to trial court's request that he review the Court's sentencing report for accuracy.

(Q) *State Wrongfully Withheld from Petitioner Statements Made To or By Prosecution Witnesses Which Materially Prejudiced Petitioner in Contravention of His Due Process Rights.*

89. The State's pretrial withholding of statements made to and by prosecution witnesses contravened the due process clause of the Fourteenth Amendment.

*Facts in support of petitioner's claims that withholding of statements to or by two prosecution witnesses contravened the due process clause of the Fourteenth Amendment.*

90. Prior to trial, petitioner sought through a *Brady* motion statements of witnesses material to the prosecution of the case. The State withheld from petitioner the statements of two witnesses—one an alleged confession of the defendant allegedly made to a jail inmate and the

other an impeaching statement made by one of the prosecution witnesses.

91. The withholding of those statements materially prejudiced the trial of the petitioner, and contravened the due process clause of the Fourteenth Amendment of the Constitution of the United States.

(R) *Evidence Upon Which Petitioner Was Convicted Failed to Prove His Guilt Beyond a Reasonable Doubt.*

92. Petitioner was convicted upon evidence which failed to prove his guilt beyond a reasonable doubt, in contravention of the due process clause of the Fourteenth Amendment.

*Facts in support of petitioner's claim that evidence failed to prove his guilt beyond a reasonable doubt.*

93. Petitioner was tried on the State's theory that he was the triggerman who killed Frank Schlatt.

94. The State's theory was that only one of the persons who robbed the Dixie Furniture Store was physically located at the time of the shooting so as to have the opportunity to have fired the shots which killed Frank Schlatt, and that petitioner was that person.

95. Witnesses for the State were unable to state which of the co-defendants who were in the front portion of the Store during the robbery was the triggerman (Tr. 245) or the direction from which the shots came. (Tr. 293-94).

96. The expert testimony on which the State relied as to the murder weapon was that it was "probably" a .38 Rossi. (Tr. 413).

97. The evidence which the State offered as a basis for petitioner's conviction was insufficient to prove beyond a reasonable doubt that petitioner was guilty.

98. Each of the grounds listed in paragraphs 15 through 97 have been previously presented to the state courts.



99. Other than the extraordinary motion for new trial filed in December, 1980, petitioner has no other motion, petition or appeal now pending in any court, state or federal, as to the judgment under attack.

100. The petitioner was represented by the following attorneys:

(a) at the preliminary hearing, trial and appeal to Georgia Supreme Court: John Turner, Esq., now with the Fulton County District Attorney's Office, Fulton County Courthouse, Atlanta, Georgia;

(b) on petition for certiorari: Robert H. Stroup, Esq., 1515 Healey Bldg., 57 Forsyth St., N.W., Atlanta, Georgia; Jack Greenberg, James M. Nabrit, III, John Charles Boger, 10 Columbus Circle, New York, New York;

(c) in state habeas corpus, application for certificate of probable cause to appeal to Georgia Supreme Court, and petition for writ of certiorari to United States Supreme Court: Stroup, Greenberg, Nabrit and Boger.

101. Petitioner was convicted on one count of malice murder and two counts of armed robbery.

102. Petitioner has no future sentence to serve after completion of the sentences imposed by the judgment under attack.

WHEREFORE, petitioner WARREN McCLESKEY prays that this Court:

1. Issue a writ of habeas corpus to have petitioner brought before it to the end that he may be discharged from his unconstitutional confinement and restraint and/or be relieved of his unconstitutional sentence of death;

2. Conduct a hearing at which proff may be offered concerning the allegations of his petition;

3. Permit petitioner, who is indigent, to proceed without prepayment of costs or fees;

4. Grant petitioner, who is indigent, sufficient funds to secure expert testimony necessary to prove the facts as alleged in his petition;

5. Grant petitioner the authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove the facts as alleged in his petition;

6. Allow petitioner a reasonable period of time subsequent to any hearing this Court determines to conduct, in which to brief the issues of law raised by this petition;

7. Stay petitioner's execution pending final disposition of this petition; and

8. Grant such other relief as may be appropriate.

Respectfully submitted,

/s/ Robert H. Stroup  
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New York, New York 10019  
Attorneys for Petitioner

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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**ANSWER AND RESPONSE**

COMES NOW, Walter D. Zant, Respondent in the above-styled action, by and through the Attorney General for the State of Georgia, and makes this Answer and Response to the habeas corpus petition which has been filed on behalf of Warren McCleskey:

**CONVICTIONS**

**1.**

Respondent admits that Petitioner is presently being held in the custody of Respondent at the Georgia Diagnostic and Classification Center, Butts County, Georgia, pursuant to a death penalty and consecutive life sentences imposed by the Superior Court of Fulton County, following Petitioner's October 12, 1978 convictions in said courts for the offenses of murder and two counts of armed robbery.

**EXHAUSTION**

**2.**

Since it appears that Petitioner has previously, unsuccessfully raised, in the state courts of Georgia, all of the grounds which he raises in the instant application for federal habeas corpus relief, Petitioner has fully exhausted his available state remedies.



## TRANSCRIPTS AND EXHIBITS AVAILABLE

## 3.

The following are attached as Respondent's Exhibits in support of this Answer and Response:

- (1) Respondent's Exhibit No. 1—A copy of the official record and supplemental record from Petitioner's trial in the Superior Court of Fulton County, Georgia.
- (2) Respondent's Exhibit No. 2—A copy of Petitioner's trial transcript from the Superior Court of Fulton County consisting of Volume I and Volume II.
- (3) Respondent's Exhibit No. 3—A copy of the opinion of the Georgia Supreme Court following Petitioner's direct appeal to said court. *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980).
- (4) Respondent's Exhibit No. 4—A copy of the original and amended state habeas corpus petitions filed on behalf of Petitioner. (Exhibits omitted).
- (5) Respondent's Exhibit No. 5—A copy of the transcript of Petitioner's state habeas corpus hearing in the Superior Court of Butts County.
- (6) Respondent's Exhibit No. 6—A copy of the deposition of Fulton County District Attorney, Russell Parker, which was submitted to and considered by the state habeas court.
- (7) Respondent's Exhibit No. 7—A copy of the deposition of Georgia Bureau of Investigation Ballistics Expert, Kelly Fite, which was submitted to and considered by the state habeas corpus court.
- (8) Respondent's Exhibit No. 8—A copy of the order from the Butts County Superior Court denying

Petitioner's request for state habeas corpus relief.

- (9) Respondent's Exhibit No. 9—A copy of the June 17, 1981, order from the Georgia Supreme Court, denying Petitioner's application for a certificate of probable cause to appeal from his state habeas corpus action.
- (10) Respondent's Exhibit No. 10—A copy of the November 30, 1981, notification from the Supreme Court of the United States, denying Petitioner's application for a writ of certiorari to the Superior Court of Butts County.

Respondent knows of no other transcripts or relevant exhibits which are available.

## SPECIFICALLY ANSWERING THE ALLEGATIONS RAISED IN THE PETITION

### FIRST DEFENSE

#### 1.

Respondent denies all those allegations set out under Ground A of the petition, and paragraphs 15 through 19 thereunder, which assert that Petitioner's constitutional rights were violated through the state's failure to disclose an alleged agreement for favorable treatment supposedly entered into by a witness and state authorities.

#### 2.

Respondent denies all those allegations set out under Ground B of the Petitioner, and paragraphs 20 through 28 thereunder, which aver that Petitioner's constitutional rights have been violated as a result of the refusal of the trial court to provide funds to Petitioner for a ballistics expert and an investigator.

## 3.

Respondent denies all those averments under Ground C of the petition, and paragraphs 28 through 32 thereunder, which aver that Petitioner's constitutional rights were violated as a result of the trial court's instructions to the jury regarding presumptions on intent.

## 4.

Respondent denies all those allegations set out under Grounds D and E of the petition, and paragraphs 33 through 41 thereunder, which aver that Petitioner's constitutional rights were violated as a result of the trial court's instructions during the guilt/innocence and sentencing phases of Petitioner's trial, pertaining to the jury's consideration of other alleged criminal acts on the part of the Petitioner.

## 5.

Respondent denies all those averments under Ground F of the petition, and paragraphs 42 through 44 thereunder, which assert that Petitioner's constitutional rights were violated through the trial court's admission of evidence pertaining to other criminal activities of the Petitioner.

## 6.

Respondent denies all those averments under Grounds G, H, I and J of the petition, and paragraphs 45 through 61 thereunder, which aver that the death penalty as applied in Georgia, is being imposed in an arbitrary or capricious fashion, and upon discriminatory grounds based on sex, race and/or poverty. Respondent further denies those averments under the aforesaid paragraphs which assert that Petitioner's death penalty is unconstitutional, because it allegedly fails to serve rational public interests, has no theoretical justification, or is cruel and unusual punishment under the specific facts of this case.

## 7.

Respondent denies all those averments under Ground K of the petition, and enumerated paragraphs 62 through 69 thereunder, which aver that the Georgia Supreme Court has engaged in an inadequate review of Petitioner's death penalty, to insure that it is not arbitrary, capricious, disproportionate, or violative of the Eighth and Fourteenth Amendments to the United States Constitution.

## 8.

Respondent denies all those averments under Ground L of the petition, and paragraphs 70 through 71 thereunder, which assert that Petitioner's constitutional rights were violated during the sentencing phase of this trial, as a result of improper prosecutorial argument.

## 9.

Respondent denies all those averments under Ground M of the petition and paragraphs 72 through 77 thereunder, which assert that Petitioner's constitutional rights were violated and his conviction was obtained, as a result of a highly suggestive, improper pretrial identification procedure.

## 10.

Respondent denies all those averments under Ground N of the petition, and enumerated paragraphs 78 through 81 thereunder, which assert that Petitioner's conviction was unconstitutionally obtained as a result of the introduction of an involuntary confession into evidence at Petitioner's trial.

## 11.

Respondent denies all those averments under Ground O of the petition, and enumerated paragraphs 82 through 86 thereunder, which aver that Petitioner's constitutional rights were violated at his trial as a result of the alleged improper exclusion for cause of prospective jurors who

had expressed unyielding opposition to capital punishment.

## 12.

Respondent denies all those averments under Ground P of the petition, and enumerated paragraphs 87 through 88 thereunder, which assert that Petitioner received ineffective assistance of counsel prior to and during his Fulton County trial.

## 13.

Respondent denies all those averments under Ground Q of the petition, and enumerated paragraphs 89 through 91 thereunder, which assert that Petitioner's constitutional rights were violated as a result of the prosecution's failure to make a pretrial disclosure of statements from two witnesses who later testified at Petitioner's trial.

## 14.

Respondent denies all those averments under Ground R of the petition, and enumerated paragraphs 92 through 97 of the petition which assert that the evidence was insufficient to prove Petitioner's guilt beyond a reasonable doubt.

## 15.

Respondent denies all those allegations of the petition which assert that Petitioner is being unconstitutionally incarcerated, or that his convictions and sentences are illegal and in violation of any of Petitioner's constitutional rights.

## 16.

Respondent denies all those allegations of the petition not hereinbefore specifically admitted, denied or otherwise controverted.

## SECOND DEFENSE

Since the Georgia Supreme Court, in a full and fair hearing on direct appeal, and the Butts County, Georgia,

Superior Court, in a full and fair state habeas corpus hearing, have correctly determined that none of Petitioner's constitutional rights have been violated, this Court should adopt the findings of the state courts below, and should summarily dismiss the instant petition as being without merit.

WHEREFORE, having made this Answer and Response to the habeas corpus application which has been filed by Warren McCleskey, Respondent respectfully submits that said petition should be dismissed, and that Petitioner should be remanded to the custody of Respondent for completion of his challenged sentences.

Respectfully submitted,

MICHAEL J. BOWERS  
Attorney General

ROBERT S. STUBBS II  
Executive Assistant  
Attorney General

MARION O. GORDON  
Senior Assistant Attorney General

JOHN C. WALDEN  
Senior Assistant Attorney General

NICHOLAS G. DUMICH  
Assistant Attorney General

[Certificate of Service Omitted in Printing]



UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

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[Title Omitted in Printing]

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PETITIONER'S TESTIMONY

\* \* \* \*

PROFESSOR DAVID C. BALDUS

(DIRECT)

[776] THE WITNESS: The, the impact of a factor, my remarks [777] applied to the impact of any factor will become apparent only when there is really room for the exercise of discretion.

If the cases are of a type that are basically unthinkable with respect to whether or not there should be a death penalty, these are not highly aggravated cases, there's no likelihood that we're going to sentence these cases to death. As a consequence, no one individual factor, except the basic factor that put them in that category where the likelihood of a death, prospect of a death sentencing seems unthinkable, basically, no one factor is going to have very much effect on those cases.

The place where factors have an influence in the decision making process is where there is room for the exercise of discretion, where the decision maker has a choice, the facts allow some sort of choice. If the case is so mitigated that the death sentence is unthinkable, the race of the victim is not going to have any effect. It's only as the cases rise in the level of aggravation that the prospect of a death sentence becomes thinkable, that these factors begin to have an effect. And I would say, Your Honor, it's not just the race of victim that seems to be having that effect in this system, it's all the factors,

all the other mitigating factors. When you're looking at the very lowly aggravated cases, that if you look for example whether the defendant surrendered within 24 hours, the one we looked at here earlier, doesn't seem to have any effect. If you [778] look at almost all the other, sort of marginal aggravating factors, statutory and non-statutory aggravating factors, they don't seem to have much effect. You have got to get the case aggravated up to a level where there's really serious consideration given to whether or not this is a death worthy case.

That's when all sorts of factors come into play, and show their effects statistically, and that's why we see a statistical effect in only the right side of this table, because it's only on the right side of this table that serious consideration is given to the imposition of a death sentence.

In these other cases over here, we have a handful of death sentences, but they aren't enough statistically to have any effect, given the tremendous number of cases that are involved in those categories. And that's why we see these effects, I believe, as the cases become more aggravated.

And as I'll point out in a later, later testimony, your honor, what further happens is that when the cases become tremendously aggravated so that everybody would agree that if we're going to have a death sentence, these are the cases that should get it, the race effects go away. It's only in the mid-range of cases where the decision makers have a real choice as to what to do. If there's room for the exercise of discretion, then the factors begin to play a role.

This is a phenomenon that's widely noted in the [779] literature in various fields that the influence of factors over decisions comes to bear only when there's real room for the exercise of discretion.

**THE COURT:** Don't fudge unless you have some leeway to fudge, some way to explain what you're doing.



THE WITNESS: That's right. Most systems are—

THE COURT: That's human nature. Now that you've explained it in a scholarly way I recognize it as being a principle I have observed in life.

\* \* \*

[880] So what we did was to focus in on cases that looked like they were the best candidates to receive a death sentence, given the facts of their cases. And that resulted in the identification of approximately five hundred cases. I made that judgment on the basis of looking at this, this table.

Q. Which table do you mean?

A. DB-89 and I said well, the top two levels there is probably where we'll see the best sense of where the likelihood of a [881] death sentence takes hold, up to the point of where the likelihood of a death sentence is very high.

And I focused in on those cases, and if you will, sort of enlarged the breakdown within those cases, expanded the subdivision of cases within that sub-group.

Q. And let me direct your attention to DB-90 marked for identification. Can you identify that document?

A. Yes. DB-90 is the result of that enlargement of that top category of approximately five hundred cases.

Q. You're talking obviously not about an enlargement of number of those case, but an enlargement of a microscopic view, if you would, of how those cases are sorted?

A. Yes. Putting it more precisely, a further subdivision of the cases along the same index that was used to create DB-89.

Q. What does DB-90 reveal?

A. DB-90 presents the race of victim disparities controlling for the race of the defendant.

And what we see here is in column B, column A, an identification which is presented in column A of the levels of predicted likelihood, that is, we go from level one to eight, from the least likely predicted death sentence to

the most likely predicted death sentence, given the factors that were being used, these are the factors that tend to explain the results.

And you can see in column B the actual death sentencing [882] rate among these sub-categories of cases. And these sub-categories were defined in terms of equal numbers of cases. I tried to make the categories equal, but because of the, where the scores broke, sometimes the categories were not the same and I wanted to keep each case with an identical score in the same category. That's why the categories vary as they do in size.

And I calculated first the death sentencing rate among those categories, so you can see even within the top five hundred group of cases that still the death sentencing rates do not begin to rise to a very high level until you get up into the top four categories, and even there they are not very high.

It's not really until you get up into the very highest category, eight, that the death sentencing rate sharply rises. I'll mention to you, although it's not reported here, that among that top 58, if you look at the top 40 in that category, my recollection is that every one of those offenders received the death sentence. Those are the most aggravated cases.

Now, this table presents in C and D the death sentencing rate among black and white victim cases, in those cases involving a black defendant.

And one can see that in the lower categories here where the death sentencing rate is not elevated, that the racial disparities are not great because there are no, there's no death sentencing rate basically.

But once the death sentencing rate begins to rise, [883] you'll note that it rises first in the white victim cases. It rises there more sharply than it does in the black victim cases. That can be seen by comparing, if you move down C and D, comparing the comparable figures at each level along the way. You can see that the numbers rise more sharply at each step along the way in

column C than they do in column D. And when you make a comparison of those numbers, as we have done in E and F, you get some measure of the race of victim disparity.

And the other feature of this is that we start out with substantially equal treatment in the cases where the death sentencing rate is low, the death sentencing rate rises, and the disparities rise.

But once the cases become quite aggravated, that's up in this category 8, the death sentence, the death sentencing rate goes up quite high, but the disparities begin to decline. And we'll note here in this top category, it drops down to .16. But as I mentioned earlier, if you further subdivided that you would find that among the top forty of these cases, the death sentencing rate is the same for the black and the white victim cases, because in that category, everybody is getting a death sentence.

What these numbers support is the hypothesis that's been developed in earlier research, most notably in the work of Harry Calvin, and Hans Zeisel who published a very extensive analysis of jury decision making in a book called "The American [884] Jury." It was published in 1966.

And in that book, they developed a hypothesis, a tested hypothesis, what they call the liberation hypothesis and in short what it was, that the exercise of discretion is concentrated in the area where there's real room for choice. If the imposition of a penalty or a conviction is not thinkable because the evidence is just not there, those are the cases they were dealing with, guilt convictions at trial, or the evidence is overwhelming, that no reasonable person could disagree that this person could be convicted, they saw no racial effects, no effects of any arbitrary factors in the decision process.

But when you look at the cases in the mid, what they call the mid-range, where the facts do not call clearly for one choice or another, that that's where you see there's room for the exercise of discretion. They characterize it, if you will, the facts liberate the decision maker to have

a broader freedom for the exercise of discretion, and it is in the context of those decisions that you see the effects of arbitrary or possibly impermissible factors working.

And that's the pattern we see here in this table, where the race, the disparities rise as we move into this grey area, where the facts are not clear, and the evidence that the facts are not clear on culpability is that among these classes of cases the death sentencing rate is not high.

But once the cases become quite aggravated, they reach [885] a point where no reasonable person could disagree that if we're going to have a death sentence, these are the cases that deserve it, then the disparities disappear.

MR. BOGER: Your Honor, at this time, I move the admission of DB-89 and DB-90 into evidence.

MS. WESTMORELAND: Same objection.

THE COURT: All right, they'll be admitted.

MR. BOGER: Thank you, Your Honor.

BY MR. BOGER:

Q. Professor Baldus, have you done the same sort of analysis with respect to the race of defendant disparities, among these highly aggravated cases?

A. Yes. The, the, a comparable analysis, Your Honor, for the race of defendant disparities in the context of white victim cases, is shown in DB-91, and it shows the same sort of pattern.

Basically, what we've done here is relocate the columns C, D, G and H that were presented in DB-90. We just reordered them so we were able to control for the race of victim and now measure disparities in terms of the race of the defendant.

And columns C and D show those disparities, and as one goes down columns C and D, you can see that the, as the cases become more aggravated, the death sentencing rates rise more sharply in the cases involving black offenders than they do in the cases involving the white offenders. And that is what produces the disparities that are apparent in columns E and F.

[886] And again we see evidence of the liberation hypothesis here. The disparities are weak, or non-existent virtually in the less aggravated cases. In the central range is where we see them, the mid-range of cases is where there is more ambiguity as to the appropriateness of a death sentence, and then they disappear in the high level category. Up in this category where 88 percent of the people receiving the death sentence, there's virtually no disparity. Those are cases that apparently are such that considerations of racial factors are just overwhelmed by the facts in the cases. And we see no effects in those contexts. That's what the data suggests to me.

\* \* \* \*

[1051] This survey of police officer cases, in Fulton County, produced the following count.

We found ten cases involving police officer victims or rather we found a total of ten police officer victims in Fulton County under the statute that was enacted on March 28, 1973.

Among those cases were 18 offenders associated with those homicides in one way or another.

Of those 18 offenders, I mention in passing, 18 offenders who were not killed by the police in the course of a gunfight or something like that, those who survived, of those 28, there were 17 dispositions.

There was one case where the police record that we looked at suggested that the person was mentally deranged and there was no disposition in the case. I don't know what happened. But by virtue of that characteristic of the offender, it does not seem appropriate to me to include in this analysis.

So that left us with 17 offenders who were potentially comparable to McCleskey.

However, a —

Q. Let me ask you before you go further, you've got 17 defendants, and you said you had 10 police homicides.



Just to begin with the summary in effect, how many death sentences resulted from this number?

A. One.

Q. Who is that?

[1052] A. That was McCleskey's.

Q. Did you conduct any analysis to determine why McCleskey's case had advanced to a death sentence, and others dropped out earlier?

A. Well, I can tell you, counsel, I can tell you the disposition of these cases.

Q. Fine?

A. As they worked their way through the system.

THE COURT: Am I looking at DB-115?

MR. BOGER: Perhaps we could follow through DB-115, yes, Your Honor.

BY MR. BOGER:

Q. If you could identify that document, Professor Baldus?

A. Yes. DB-115 is a footnote from our report which lists the 17 offenders, and ten police officer victims of that, that this analysis relates to.

Q. And does it accurately list those?

THE COURT: Just to clarify the record, the victims here all died as a result of whatever the offenders did?

THE WITNESS: Yes, Your Honor.

THE COURT: Okay.

BY MR. BOGER:

Q. And you've accurately examined the list and to the best of your knowledge it's true?

A. Yes.

[1053] Q. If you could take us through the disposition of these cases?

A. Yes. Our analysis focused on the cases that we thought would be, were most comparable to Warren McCleskey's.

That means that we wanted to look at cases where the defendant was a trigger man, and the case also involved



a serious contemporaneous offense, because according to the standard that we've been using before for a, classifying cases, we had viewed as less culpable than McCleskey, cases in which the offender was not the trigger man.

So we sorted the cases into two categories and they produced a pool of seven cases in which there was a trigger man, including McCleskey, who was also involved in a serious contemporaneous offense.

And those serious contemporaneous offenses were burglary, armed robbery, and in one case the shooting of another person in the course of the homicide.

The, of those, let me make one correction there. That's seven cases in addition to McCleskey, by my count here.

Q. Professor Baldus, let me direct your attention to DB-116 marked for identification, and ask you if you can identify that as part of your discussion of the disposition of these cases?

A. This is DB-116?

Q. That's right?

A. Yes, number 116 lists the offenders. The first page of 116 breaks them down into categories that I just described.

[1054] But first at the top it lists all 17 offenders, and shows the race of victim and race of defendant characteristics of the cases, and the outcome with respect to a life or death sentence.

The second row and third row indicate the more or less aggravated cases as classified in the fashion I just described.

And in the succeeding pages present a, working papers that show race of victim and race of defendant disparities among these cases.

And then following that are the police records that were used to compile this tabulation, as well as summaries from the back, rather at the back of this exhibit, Your Honor, you'll find summaries of the type you've seen before we generated in our study because of the 17 defendants, there were four who happened to be in our study. So we included their summaries here as well.

So, to return, if I could, to the disposition of these seven offenders, you can see at the beginning of DB-116, there are seven people, not including McCleskey, who were involved in a serious contemporaneous offense, and the trigger man.

Of those seven offenders, three of them pled guilty to murder, and had no penalty trial following the guilty plea.

An additional two went to trial on murder charges and were convicted and there was no penalty trial held thereafter.

Two other offenders went to trial on murder charges, [1055] and they were convicted and had a penalty trial. And of those two penalty trials, my records show that one received the death sentence and one received a life sentence.

Q. And the death sentence was?

A. McCleskey's.

Q. So out of the seven, five either pleaded guilty to murder or were convicted at trial of murder, and did not advance to a penalty phase, is that correct, sir?

A. That's what my records show, yes.

Q. And the jury disposed of one case at the penalty phase with a life sentence and one with a death sentence?

A. Yes.

Q. What did you conclude from this analysis of the police victim homicide cases in Fulton County with respect to racial impact?

A. Well, first of all, with respect to the overall race effect in these cases, it's hard to draw any inference because we only have one death sentence. We have a lot of white victim, officer victim cases, where the defendant pled out, so there is not as substantial disparity in terms of the death sentencing rates in these two populations. There's only one death sentence, so the rate is low in both sets of cases. So you don't see a strong overall effect, number one.

The only hint one might get from this is that in the other penalty trial case that was held where a life sentence was [1056] returned, the victim in that case was a black victim. But we're dealing there with a sample of two cases and certainly one can't make very much of that, even though it is consistent with the other evidence as to what was going on in the earlier stages.

The, the principal conclusion that one is left with is that, that this death sentence that was imposed in McCleskey's case is not consistent with the disposition of cases involving police officer victims in this county. That there were a number of other cases that were comparable in terms of having, involving a serious contemporaneous offense and involving the defendant as a trigger man where for a variety of reasons, principally decisions by prosecutors, the case did not result in a death sentence.

So I can say that the pattern of decision in this county is that there's a very low death sentencing rate, and in officer cases, in fact, the only one is the petitioner in this proceeding.

So, this, by the way, is consistent statewide. There's not an important, terribly high effect associated with having a police officer victim statewide, as well.

And when you look at that fact, that killing a police officer statistically does not show an important impact either in Fulton County or statewide, you also examine the fact that the overall death sentencing rate in this county is low, very low, it's low even among the more aggravated categories of cases [1057] in this jurisdiction, and you take into account that even in B2 cases, involving a serious contemporaneous offense, the death sentencing rate is low in Fulton County, even among the more aggravated cases.

What this suggests to you is that McCleskey's case falls in this grey area where liability and culpability are not overpowering, and this is the kind of case where our research and the literature concerning the liberation hypothesis suggests that you would find the greatest

likelihood that some inappropriate consideration may have come to bear on the decision.

In an analysis of this type, obviously one cannot say that we can say to a moral certainty what it was that influenced the decision. We can't do that.

What we do know is what the overall pattern was, the overall rates, the type that invite a wide range in the exercise of discretion in this kind of case, and there's nothing that looms in McCleskey's record that would clearly distinguish his case from these other cases.

In a circumstance like that, it seems, it is my opinion that a racial factor could have been the consideration that tipped the scale against McCleskey in his case.

\* \* \* \*

[1075] Q. All right. Let's look over at DB-112. Now you've not identified that document to date.

If you could tell me what that is, Professor Baldus?

A. Yes. DB-112 was the final, it reflects the final step in our analysis of the near neighbors in Fulton County. It gives a thumb nail sketch of Fulton County, black victim cases involving an equal or greater level of culpability of Warren McCleskey with a life sentence imposed.

Q. And does it therefore fit into the overall analysis you previously testified to about the significance of the near neighbors?

A. Yes. In the conduct of a near neighbors analysis of the type we did. One can make comparisons between comparable cases [1076] and estimate rates at which they are disposed of in a different fashion.

Another approach is to take an individual offender, and compare him with other cases that you think are of equal or greater culpability, in which a lessor sentence was imposed.

And that's what the purpose of this analysis is, was, was to identify those cases that, in which one perceives an overall level of culpability that in my judgment was

comparable to McCleskey's, and sort those cases into the category of black victim. These are the—

Q. Does this table reflect in effect the product of your analysis, or one of the bases on which you relied in completing this near neighbors analysis?

A. Yes. This is one of the reasons that I have the opinion that with respect to the serious cases that are potential candidates for capital punishment in Fulton County, that you see that there are in fact race of victim effects because it's hard in my opinion to distinguish these cases in terms of their death worthiness, if you will, from Warren McCleskey's case and yet these are all black victim cases that received a life sentence.

\* \* \* \*

[1081] BY MR. BOGER:

Q. Finally, Professor Baldus, I will ask you one closing question.

Are you familiar with a term used in social sciences called triangulation?

A. Yes.

Q. What does it mean?

A. The concept of triangulation relates to the approach that one takes of employing a variety of different methods to address the same question.

The concept has the same meaning that it does in navigation, where one, dead reckoning in sailing for example, one takes sights at different points and gets bearings and lays the bearings over top of one another and if the bearings all focus on the same point, they give one confidence that one has properly identified himself on the map.

[1082] We recognize in that process that every one of those, each of those bearings has some error in them. None of them is perfect. But that the combined message of it tells you, especially when they produce the same results, that you are getting a correct picture.



And so it is in statistical analysis, or quantitative analysis of all types, that we take different procedures and address the same question. We know that each procedure gives us merely an estimate.

But we examine the same data with different procedures, and see the extent to which we get the same answer, using alternative procedures. And in this case, we also used qualitative methods, actually making case comparisons, and we found we got the same sort of answer.

In addition, the notion of triangulation extends to the use of different data sets which provide, which raise the same questions and potentially provide the same answers.

In this case, we have two completely different data sets that address at least two of the critical points in Georgia's charging and sentencing process. There, again, we used alternative methods to address the questions posed with respect to the racial effects at each one of those stages and we found comparable results.

It's this widespread consistency that we see in the results of many analyses using two distinct data sets, looking [1083] at different sub-sets of the data sets, different stages in the process, it's this triangulation approach, if you will, that provides the principal basis for our opinions that I have stated earlier in this proceeding, about my belief that there are real race effects operating in the charging and sentencing system in this state.

MR. BOGER: No further, questions, Your Honor.

THE COURT: Let me—don't go away Mr. Boger, because I have one question.

MR. BOGER: Fine.

THE COURT: To clarify my thinking at this point.

Thinking about disparate treatment cases, and the difficulty of proving disparate treatment with statistics, are you able to quantify in McCleskey's case the part that race of the victim played in his getting the death penalty, under your view?



THE WITNESS: No. I can give an opinion based upon an analysis of the data, but I can't say a particular factor constituted fifteen or twenty percent of the force.

We, the, we can say, Your Honor, when we look at a, an aggregate group of decisions, we can say a particular factor will explain a certain amount of the variation that we see in the results of the aggregate.

We can also say as we've tried to do here, that when we examine the impact of a particular set of variables in a system, [1084] that you can roughly estimate the relative importance of them. But it's only an estimate.

That, I think, is as far as you could go with respect to quantitative methods in trying to identify the impacts of factors in a system.

I think our estimate, another measure we used is the impact, practical impact that these effects have in the system was the comparison we did between the population of death row as it is, as to what we might expect in a very hypothetical circumstance. That's a measure of the practical impact that these factors are having in the system.

THE COURT: Well, the trouble with that table, I thought an awful lot about it since I excluded it from evidence, there is no logical foundation for the thesis that if you got prosecutors and juries to clean up their act, under your view of their wrongdoing, that the death penalty rate would remain at its present rate.

Essentially what you're saying, in these figures to me, is that what you testified to with the first of those two tables, and that is, the system is reacting less partially against the homicide committed against a black person than it is against a white person, and if they applied standard treatment, it would be the higher number.

That was, it's so very speculative, you could probably argue the other side of the coin as well, either being the [1085] devil's advocate or because you really believe it, either one. That was the trouble I had with that as being a practical measure.

But in terms of the preponderant motivating factor or anything like that, could you in fairness say that what caused McCleskey to get the death penalty as opposed to anybody else, was the fact that he murdered a white person as opposed to a black person?

THE WITNESS: No, I can't say that was the factor, no. But what I can say, though, is when I look at all the other legitimate factors in his case, and I look to the main line of cases in this jurisdiction, statewide, that are like his, particularly the way B2 cases and cases involving officer victims are disposed of in this jurisdiction, his case is substantially out of line with the normal trend of decision on such cases, and given that it is aberrant in that regard we are forced to ask ourselves what could cause it.

I can't see any factors, legitimate factors in his case that would clearly call for it, that would distinguish it clearly from the other cases. The cases are not identical, but there's nothing really cries out for why this case should be treated that much differently.

So you're left with what other factor it might be, and what I can say, and what I do say is that the racial factor is possibly the thing that made the difference in the case. Real [1086] possibility in my estimation, that that's what made the difference. But I can't say with any, I can't quantify the likelihood that that is true. That's as far as I think I can go in terms of making responsible judgment.

. . . .

DR. GEORGE G. WOODWORTH

(DIRECT)

. . . .

[1265] Q. Now, Professor Woodworth, do you have any opinion, based upon your conduct of these diagnostic tests, on whether the statistical procedures for calculat-

ing statistical significance levels in your report and in the studies before the court are valid and acceptable?

A. My opinion is that the statistical procedures used in preparing the report are valid, yes.

Q. And what, therefore, is your opinion, if any, on the issue in question about race of victim?

A. My opinion is that on the basis of a variety of analyses, and the convergence of different forms of evidence that the race of victim effect cannot be explained by errors in statistical technique.

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MR. L. G. WARE

(DIRECT)

\* \* \*

[1328] Q. Okay. Before we focus on the reports you do for the board, let me ask you just a couple more preliminary questions.

Are you familiar with the educational requirements necessary for being hired in the parole officer position?

[1329] A. You have to have an undergraduate degree.

Q. And is it your understanding that all parole officers have that undergraduate degree before they're hired?

A. At this time, they are.

Q. All right. Do you know how long that requirement has been in effect?

A. No, sir, I sure don't.

Q. Okay. Now, focusing on the reports that you were involved with in preparing for the board of pardons and paroles, since 1976, I think you indicated. Is that correct?

A. Right.

Q. What, is that the primary responsibility of the field representative, or the, I guess you called it a parole officer, job title?

A. The field parole officers do investigations and supervision of parolees.

Q. What is involved in the, is there an investigation report that is done on persons who become subject to the state correction system?

A. We do an investigation on, I guess, just about everybody that goes into the system now.

Q. All right. Just so that that's clear, would that include everyone who has entered a plea or who was convicted of a murder charge?

A. I think that would be accurate, yes, sir.

[1330] Q. And how about the same with respect to voluntary manslaughter?

A. We would still do an investigation.

Q. All right. What is the purpose of the investigation that you do?

A. Just to provide information to the parole board about a particular crime that was committed.

Q. All right. Excuse me. Now, what time is the, what's the timing of this investigation?

Let me ask that question again.

When, I think you said that, let me back up, and be clear.

When you were doing reports, you were doing them in Augusta during your whole time period?

A. Right.

Q. Okay. When you, would you just briefly describe the process in developing an investigation when you were in Augusta doing these reports?

A. We received a request from our records department to conduct an investigation. The legal investigation—you want me to go into details on it?

Q. Please, just generally describe the steps involved in preparing the report? The legal, what you call the legal report?

A. We check local criminal records, we go to the clerk of [1331] court, get sentence information, indictments, jail time affidavits, we get police reports from the agency that handled the case.

And we write up a report with that information in it and submit it to the board.

Q. All right. In terms of the timing of this, how soon after a conviction would you routinely be conducting an investigation?

A. Just a short time. I don't know exactly. As soon as the clerk of court submits the conviction data to the department, the Department of Corrections, they in turn notify us, so it's a short time.

Q. All right. Are there any categories of information that are routinely contained in police reports that would be omitted by you in your reports?

A. Not that I know of.

THE COURT: Excuse me, counselor, but as we are talking about reports generated during the mid-70's and available in the '80-'81 periods, you probably need to make sure this witness is focused on the time period.

MR. STROUP: All right, sir.

BY MR. STROUP:

Q. With respect to the reports that you prepared for the parole board, for use by the parole board, and I think you indicated that was the period 1976 through, up until and until 1983. Is that correct?

[1332] A. Yes.

Q. All right. With respect to those reports, would there be anything contained in the police reports that you would routinely omit?

A. Not that I'm aware of.

Q. All right.

MR. STROUP: Excuse me one moment, Your Honor.

BY MR. STROUP:

Q. All right, in describing generally the process that was involved in obtaining the reports for the parole board during the period that you've just identified, what, if the case involved a homicide, what other sources



other than the police report and the clerk's office would you routinely contact?

A. If our report, if we didn't think the report had all the information that we thought we needed, we may interview the officers that were involved in the case.

Q. All right?

A. And that particular type case, we probably would.

Q. You probably would?

A. Yeah.

Q. All right. Are there ever any occasions in preparing the report when you called upon other local officials related to the trial of the case?

A. Okay. We possibly would talk to the district attorney that handled the case.

[1333] Q. In what situations would you do that?

A. In murder cases, rape cases, armed robbery, the more serious offenses.

Q. And what would be the information sought from the district attorney?

A. Just his comments concerning the case.

Q. Can you tell of any examples of comments from the district attorney that you would receive?

A. Not in particular.

Q. Well, would it go to his impressions regarding what happened at the, involving the particular crime?

A. Yes, sir, it could.

Q. All right. Can you tell me of any other examples?

A. No, sir.

Q. Were there any guidelines in effect that directed that, directed you in the steps that you should take in conducting this investigation for the parole board report?

A. The manual that you have.

Q. All right.

THE COURT: Was that manual in effect in the mid-70's?

THE WITNESS: We had a manual. I think that particular manual there was not completed until around '79, I think. I don't remember the exact date.



THE COURT: After it was completed, did you go back and conform the reports that had been previously supplied to the [1334] parole board with the manual or did the old reports remain as prepared under the old procedure?

THE WITNESS: As far as the procedure for conducting our investigation, I don't think that was changed. It was just that they updated the manual, if I understand your question.

THE COURT: Well, for example, did you generate such reports as you've been testifying about in '72, '73, '74?

THE WITNESS: Yes, sir, the board, since it was created, they, you know, we've had to submit or officers have had to submit the same type investigation.

THE COURT: Did you follow the same procedures in '72, '73, '74 as are outlined in that manual?

THE WITNESS: Yes, sir, as well as I can remember.

BY MR. STROUP:

Q. Let me direct your attention to paragraph 3.02 of those guidelines, if I might?

A. Okay.

Q. Would you—is it your recollection that those guidelines were in effect throughout the time period, '72 through 1983?

A. As well as I can remember.

Q. All right?

A. I can't say for sure. I didn't deal directly with the parole board at that time.

Q. All right. But from 1976, you did, isn't that correct?

A. Yes, sir.

[1335] Q. All right. And what does that guideline at paragraph 3.02 state with respect to the need of the parole board to have complete information regarding the crime that has occurred?

A. You want me to read a particular part?

Q. Well, it—if you see a part in there that addresses that, yes?

A. Talking about the thoroughness of the report?

Q. Yes, what does, what do the guidelines call for?

A. I have three whole pages.

Q. All right. If you would just read the, beginning “the importance of this report” sentence?

A. Okay. “The importance of this report cannot be overemphasized. And where the offender has been convicted of crimes against the person, it is imperative that officer extract the exact circumstances surrounding the offense.”

Q. And the next one?

A. “Any aggravating or mitigating circumstances must be included in the report.”

Q. And then let me direct your attention to paragraph 2 on that same page, with regard to what is thought regarding prior offenses?

Does it call for a, as complete a documentation as possible with respect to prior offenses?

A. I don't see it in that particular paragraph.

Q. Maybe I misread it.

[1336] That paragraph in fact goes toward the detail with respect to particular offenses, is that correct?

A. Yes, sir.

Q. All right. Turning to paragraph 9 on the next page, does that indicate what should be included in the report with respect to the circumstances of the particular offense?

A. Yes, sir.

Q. All right. Could you just read what that paragraph calls for?

A. “Circumstances of the offense. This should be obtained in narrative form. It should be taken from the indictment, the district attorney's office, the arresting officers, witnesses and the victim. A word picture telling what happened, when, why, where, how and to whom should be prepared. Other information to provide includes

the date of arrest, dates in jail from time of arrest to date of conviction on present offense. If the subject is on bond, on escape or in a mental institution during part of this time, this should also be shown by giving appropriate dates. If the offender was arrested and held in jail in another State in connection with this offense, the date in custody either in the other State or in Georgia should be given. If he was arrested on other charges, the date he was released on the other charge must be shown."

Q. Was there also any requirement imposed by the guidelines or suggested by the guidelines that indication should be given in [1337] the report as to the source of the information?

A. Yes, sir.

Q. Is that paragraph 10?

A. Yes, sir.

Q. And it indicates that the source of the information should be identified?

A. Yes, sir.

Q. And then with respect to the guidelines again, is there any particular comment in the guidelines with respect to persons who have received life sentences or sentences in excess of fifteen years?

I direct your attention to that?

A. Okay.

Q. What does it read?

A. "Parole officers should be as thorough as possible when conducting post-sentences on persons who have received life sentences or sentences in excess of fifteen years."

Q. All right, sir. When you conducted reports, did you, yourself, attempt to follow the guidelines as described in the operations manual?

A. Yes, I did.

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## DR. GEORGE G. WOODWORTH

## (REBUTTAL)

\* \* \* \*

[1734] Q. Let me give you some documents that I've marked for identification as GW-8, and I'll ask you to examine them and identify them.

A. GW-8 is a reproduction of a previous exhibit. It shows for black defendants our estimated probabilities, or if you prefer, average rates of death sentencing at various levels of aggravation, as defined by 39 aggravating and mitigating background variables.

Mr. McCleskey has an aggravation score of .52, and I've indicated approximately where he's located on the aggravation [1735] scale.

As you can see that places him in a class of defendants where there is roughly a twenty percentage point or greater disparity between black victim cases than white victim cases as estimated by our model.

Now, I—

Q. Now I want to direct your attention to a slightly different direction and come back to this notion of average disparities and your conclusions about them.

But you have a table, Table 1 in GW-4, about which you've previously testified, which involves a number of different diagnostic tests and analyses that you performed on several of the important models by which you and Professor Baldus have testified.

Do all of these analyses in Table 1 of GW-4 give an accurate estimate of the race of victim disparities, and the race of defendant disparities?

A. No, indeed, they don't. This was intended as a series of diagnostics. Some of these rows do indeed give valid unbiased estimates of disparities. In ways that I'll elaborate on in a moment.

Other rows in this table were simply intended to exercise the regression model in certain ways to see if it was going to break under the strain, to speak colloquially,

and the indict influential case analysis is an example of that.

[1736] The figure .041 in the co-efficient column is in no way—

Q. Now, this is which model?

A. Pardon me. In the mid-range model, in the row marked DLS, with 48 most influential cases removed, we see a regression co-efficient of .041.

Now that is not intended to be an estimate of the magnitude or even the average magnitude of the race of defendant disparity in the universe. This is, the entire and sole thrust of that row in the table is that the race of victim effect is not concentrated in a small number of cases, rather that it occurs throughout the data set.

Q. Well, now, do you, as a professional statistician, have figures in which you have confidence concerning the overall estimate of the race of victim disparity as shown by the data that you've collected and analyzed?

A. Yes, I do.

Q. What are they?

A. As Professor Baldus has indicated, we adopted a triangulation approach in this the study. I have perhaps two, maybe three legs of the triangle represented here, I guess it's perhaps even a quadrilateral at this point.

Q. When you say here, you mean Table 1?

A. Table 1.

The first row, WLS, weighted least squares, provides an estimate of the average disparity, averaged across all levels of [1737] aggravation. The fact that we've—

Q. This is using the mid-range model?

A. Yes. Again I'm referring to the mid-range diagnostic model, and its estimates that on average, there's an eight percentage point disparity between black and white victim cases.

Now that's, of course, averaged across all levels of aggravation.

Q. Have you computed where Mr. McCleskey's case would fall using that method, or that model?



A. Well, as you recall, this method does not give estimates at individual aggravation levels. It's an average estimate over all aggravation levels.

Q. All right.

A. So this .076 would not refer specifically to any defendant but to the average overall defendants.

Q. Right.

A. The second row here, marked OLS, is biased. It's a biased estimate. It was placed in there again to exercise or to test the breaking point of the model to see if the race of victim effect was due to the use of weights.

The worst case analysis again is not intended to give unbiased estimates.

I've commented on the influential case analysis.

The weighted least squares, second order interactions, represents what I consider to be the most accurate achievable [1738] least squares regression estimate.

Q. What is that number?

A. Well, that number varies as you can see from, from, excuse me, I have lost the exhibit number.

Q. Are you talking about GW-8?

A. I believe this is 5-A.

Q. Okay?

A. Figure 2.

As we can see, the disparity between black and white victim cases in this case for black defendants, varies with the level of aggravation. So one can't quote a single figure.

Q. Well, can you look at Mr. McCleskey's own case in terms of that—

A. Yes, I can. As a matter of fact, I have checked for the racial disparity at Mr. McCleskey's level of aggravation in, in the 3 legs of our triangulation method.

In this particular case, as I testified to earlier—

Q. And you're referring now to GW-5A?

A. Yes, excuse me, GW-5A.

Mr. McCleskey's level of aggravation, the racial, race of victim disparity is 22 percentage points. And that is a



graphic estimate. I could give a more precise one by communicating with my computer.

I have also located as I said Mr. McCleskey in Professor Baldus' exhibit 90.

[1739] Q. That involved the eight levels of aggravation?

A. That involved the index method, one of the three legs of our triangulation procedure.

Q. What was the result for Mr. McCleskey under that method?

A. I would have to consult that table, so I could clarify it.

Q. Fine. I'll be glad to hand you that.

A. I don't need to look at it, well, in this exhibit, DB-90, Mr. McCleskey is located at level 5 of the aggravation index, and we can see that at level 5 of the aggravation index, the black victim cases, black victim cases have an average death sentencing rate of .17, that is to say, 17 percent; white victim cases have an average rate of 35 percent, rate, period, not an average rate, 35 percent; and the disparity is there for 18 percentage points by the index method, at maximum level of aggravation.

Q. You referred to a third leg to this triangulation?

A. The third leg of the triangle is a logistic regression, and for this purpose, we can look at unweighted logistic, which we believe, which we have reason to believe gives unbiased estimates, and we find a logistic regression coefficient of 1.24. Again referring to my Table 1 under the mid-range model, unweighted logistic, is 1.24.

Now if you recall that 1.24 is not directly interpretable. It has to be translated into a death odds multiplier and its death odds multiplier is 3.5.

[1740] Now, at Mr. McCleskey's level of aggravation, the black victim cases have odds of about 15 to 85 of receiving death. That's, the odds are 3 to 17.

Now if we increase those odds by the death odds multiplier, namely multiply the odds by three and a half, we

get odds of 10.5 to 17, which translates into a probability of 38.2. Thus the disparity, the estimated disparity under the logistic regression model, at Mr. McCleskey's level of aggravation, is 38.2 percent, minus 15 percent, which works out to be 23 percent, if I did my arithmetic right.

So we have almost complete convergence of the three legs of our triangle. The index method suggests that at Mr. McCleskey's level of aggravation, the disparity between white and black victim cases is 18 percentage points.

The weighted least squares with interactions giving sufficient flexibility to match Mr. McCleskey's case, gives us an estimated disparity of 22 percentage points.

And the logistic method which I just mentioned gives us an estimate of 23 percentage points.

So one, so, it would seem that at Mr. McCleskey's level of aggravation the average white victim case has approximately a twenty percentage point higher risk of receiving the death sentence than a similarly situated black victim case.

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DR. RICHARD A. BERK

(REBUTTAL)

\* \* \* \*

[1761] Q. Doctor Berk, there's been some testimony, well, perhaps I can start with the same place, do you recall in Doctor Katz' report some discussion of the, what he called the problem of unknowns information in the data set that was worked from in this study?

A. I do.

Q. Had you ever encountered a problem of that sort?

A. Well, in two senses I have.

One is, as is apparent from my vita, I was on the National Academy of Science's panel on Sentencing Research which was a two-year project by the U.S. Department of [1762] Justice to review what was known about the determinants of sentencing and some recent reforms

of sentencing procedure. It was an interdisciplinary group of statisticians, law professors, the head of California Department of Corrections, a judge and so on, and in our discussions, data quality became salient, because since especially in the earlier work data quality was an extraordinarily serious problem.

Q. Was there ever a problem in the discussions there with regard to how to treat a situation where a file might not reflect information and whether or not one could or should infer that that might mean a decision maker didn't have that information?

A. Yes. The first point that was to be stressed is that whether or not missing data or a problem is first of all a substantive, not a statistical problem. It's not something that a statistician alone can judge, because it's substantive in its roots. And this became clear as judges and public defenders and so forth on our sentencing panel kept reminding us academics that these were real people making real decisions, and that missing data depended upon what was available to the decision maker at the time.

And if a piece of information was not available when a decision was made, it was missing in a very general sense, but it was also irrelevant in another sense and could be treated as absent as opposed to just missing.

[1763] Q. Occasionally, I take it there may be some situations where the record with regard to particular kinds of data might not have something, but based on the knowledge of the system, one could assume that the individual decision maker might have had that particular information?

A. That's right. There can be legitimate missing data. I'm not at all saying that is not a factor. I'm just saying that there's a clear distinction between data that really was available when a decision was made that somehow your net didn't catch, as opposed to data that was not available when a decision was made and was gen-

erally, therefore, irrelevant to the decision maker's actions.

Q. Which of those categories do you understand Professor Baldus to have treated most of the unknowns in that case?

A. To the best of my understanding, the vast majority of, quote, missing data in the Baldus effort were of the kind that they were unavailable to the decision maker when the decision made, and therefore are not missing in the sense of being a mistake in the data collection effort.

Q. How did that interpretation or treatment of that data by Professor Baldus compare to the, any analyses that were done in the National Academy of Science's discussions you were involved in?

A. The major point is that the panel emphasized the need to be sensitive to the substantive implications of missing data in a [1764] particular case. And that is precisely to my understanding what Professor Baldus and his colleagues did.

Q. Now with regard to data that you say is truly missing where you don't know—

A. It's a mistake?

Q. It's just a mistake or a gap in the record?

A. Uh huh.

Q. Are there techniques that can be utilized statistically to deal with that?

A. There is a wide variety. One only has to thumb through the most recent issue of the major journals to find many articles in which imputation is a major activity. The U.S. census, for example, does it all the time as a matter of course.

Q. To the extent that there might be that kind of missing data in Professor Baldus' study, do you have any way of assessing what the impact of that might have been or might be on his results?

A. Well, that's a bit more complicated.

I did look at the some of the data and of course I have some familiarity with the stability of the results.

My feeling is if the missing data were such a problem two things would happen which do not happen in the Baldus work.

One is the aggravating and mitigating circumstances which clearly have effects by and large as anticipated wouldn't show anything. If it really is garbage in and garbage out, we [1765] wouldn't be finding effects consistent with the way we believe the system to work.

The second point is if it was really garbage, then very very minor changes in which variables were included would flip the important effects from positive to negative and positive back again.

And what you find, for example, in race of victim is that while the size of the co-efficient will vary in magnitude, one never has a sign flip.

Another way of saying it is if there's really nothing going on, one would be as likely to find errors producing negative co-efficients as positive co-efficients, with the average over different models, perhaps, being zero.

What we find in situation after situation is a consistent effect in which race of victim makes a difference in one direction. That's not what you normally find if there are bad problems with missing data that are distorting results.

Q. In terms of the normal, are there any conventions or estimates you can give of the magnitude of the missing data. Quote, problem?

A. These are rules of thumb that different researchers develop and they are enormously context specific, so that an amount of missing data in one problem might be quite different than the implications in another.

In criminal justice research, which I've been doing for [1766] a decade, and as members of the panel were as well, missing data of the order of 10, 15 percent, almost never makes a difference. You can't guarantee it, but it almost never makes a difference.



When you start losing three or four times that much, then you have more serious problems.

Q. Do you have any recollection or idea where Professor Baldus' study falls on that kind of scale?

A. For the variables that seem particularly important and relevant, my recollection was that missing data numbers were, the true missing data numbers were much much smaller than the danger levels that people usually look for.

Q. So in your opinion, based on your knowledge of this research and your experience in related research, do you see any reason to doubt the findings of Professor Baldus and Doctor Woodworth with regard to race, due to the, either the treatment or the existence of unknowns?

A. Of course, one can never be certain, and an academic would never tell you he was certain, even if he was, but this has very high credibility, especially compared to the studies that we reviewed. We reviewed hundreds of studies on sentencing over this two-year period, and there's no doubt that at this moments, this is far and away the most complete and thorough analysis of sentencing that's been done. I mean there's nothing even close. There are several studies underway which are comparable, but they're not on death penalty and they're not that far along.

[1767] Q. When you say the survey you took, was that death penalty studies or all sentencing studies?

A. All sentencing studies, death penalty studies included.

. . . .



## RESPONDENT'S TESTIMONY

MR. L. G. WARE

(CROSS-EXAMINATION)

\* \* \* \*

[1340] BY MS. WESTMORELAND:

Q. Mr. Warr, in relation to this report that you were [1341] discussing the preparation of, the parole officer's report, at what stage in the proceeding against a particular offender is this report prepared?

A. After he's convicted.

Q. So after he's, would that be after he's entered the state prison system?

A. He's already entered the state system. We're not notified until after he's entered the state system and becomes, he's assigned a number, institution number, and corrections notifies us when they pick him up.

Q. So your information would reflect the total information that's been accumulated during both prior to the trial and during the trial and after the trial, instead of just information that was known prior to trial, would that be correct?

A. Right. Any, any information, yeah, I say yes.

Q. In making, when you indicated that you, I believe, solicited comments from the district attorneys in making these reports, was that accurate as well?

A. Yes.

Q. Did you ask, were you given a form for a, specific inquiries, specific questions to be asked of the district attorneys or was it just a general question?

A. It was a general question, if they had any comments about a particular case.

[1342] Q. So there were no specific areas that you were instructed to ask about?

A. No.

Q. As far as going back and talking to the police officers instead of just relying on the police officer re-

ports, was that routinely done in specific categories of cases?

A. I wouldn't say routinely. That's sort of left up to the individual officers.

THE COURT: Well, we're dealing with murder cases here, so if you would restrict your answers to your perceptions of what happened in the homicide and murder cases.

THE WITNESS: The guidelines, I think, say, the policy is that we would probably, or the board would want to contact the officers that handled the case, but if we had a thorough enough investigation, offense report, filed by the law enforcement officers, if it was detailed, and we wouldn't necessarily contact them.

BY MS. WESTMORELAND:

MS. WESTMORELAND: That's all the questions, I have. Thank you.

MR. STROUP: No questions, Your Honor.

THE COURT: Wait just a minute. I guess you're principally familiar with the reports turned out by the Richmond County constabulary those are the one that you saw most often, is that right?

[1343] THE WITNESS: Yes, sir.

THE COURT: What format were those police reports?

THE WITNESS: The reports that the officers filed?

It's in a, they've got a form that they fill in vital statistics on, and then, they, there's open space after that where they actually write out the offense report.

THE COURT: How long is that?

THE WITNESS: I guess it would be according to the individual case. I guess that's the easiest way to answer it. It would be according to the individual case.

THE COURT: Do you have a feeling of what you typically encountered in homicide and murder cases? Was it always greater than ten pages, always less than two?

THE WITNESS: I never saw one that was ten pages long. I say probably a couple pages, 3 pages, maybe.

THE COURT: My personal impression from having looked at police reports in other positions, is that they very often are kind of like investigative summaries of what the officer in charge of a case discovered.

Is that a fair characterization of what you saw?

THE WITNESS: Yes, sir. We, there would be, I would think, several reports. The arresting officers, or the first officer at the scene would usually file, you know, a real short report. Then it would be turned over to the investigators, and they would give a, more detailed information.

DR. JOSEPH L. KATZ

(DIRECT)

\* \* \* \*

[1428] Q. Doctor Katz, I remind you, you're still under oath this morning.

If we could backspace just briefly, Doctor Katz, to catch up a little bit on what we've done in the past day.

Can you explain for us just very briefly what data sets you have utilized in preparing the tables that we're presented to the court?

A. Yes. I received three different tapes or boxes of cards. In late January. I received four boxes of computer cards which contained the information for the procedural reform study, and a magnetic tape, which contained the data for the charging and sentencing study.

Then approximately July 30, I received a second tape which contained 3 files concerned with the charging and sentencing study.

Finally, on August 8, I received another magnetic tape which contained 3 files for the charging and sentencing study and two files for the procedural reform study.

Q. And is it this later tape that you utilized yesterday in rerunning certain tables?

A. Yes.

Q. Would you refer to a document that has been marked Respondent's Exhibit 17A?

[1429] MS. WESTMORELAND: And at this time, I'll note for the record we're withdrawing Respondent's Exhibit 17 which I believe was identified but not admitted.

BY MS. WESTMORELAND:

Q. Would you identify Respondent's Exhibit 17a please?

MR. FORD: Your Honor, I don't have any documents marked with exhibit numbers, so perhaps if we could refer to tables or some other way I could follow along.

MS. WESTMORELAND: Certainly. We didn't quite get the opportunity.

Respondent's Exhibit 17 was labeled as Table 1 and that is the table that is being withdrawn.

BY MS. WESTMORELAND:

Q. And if Doctor Katz could state the heading of Respondent's Exhibit 17A.

A. "Counts of the number of unknowns for variables in the procedural reform study."

Q. And would you just identify this table for us, please, Doctor Katz?

A. Yes. I prepared this table yesterday, after running some computer runs utilizing the data from the procedural reform study that I was given on August 8.

I have selected the 607 cases out of the 818 cases that were given to me in those computer files that were equivalent to the 607 cases that I was given earlier in January. [1430] I also looked at both procedural reform study files that I had given to me on August 8, and I got pretty much the same results.

Q. And has this, was this table then run from the most recent tape that you were provided?

A. Yes. And I compared the two different files that I had for the procedural reform study.

As far as I can tell, they are equivalent, although I haven't been able to do intense analysis to determine that fact. But I don't believe that it will affect the number of unknowns, since I checked it over with respect to both those files.

MS. WESTMORELAND: Your Honor, at this time, we would submit into evidence and ask the court to admit Respondent's Exhibit 17A.

THE COURT: Mr. Ford?

MR. FORD: As I understand it, this is the same as Table 1, which the court has already admitted, so—

THE COURT: I have not.

MR. FORD: You have not admitted it?

My only question would be then ultimate relevance of the unknowns, Your Honor, and not all of it has been tied up, but later on, but if so, I have no objection.

THE COURT: It shows something about the completeness of the data base, and I will admit it.

MR. FORD: Thank you, Your Honor.

[1431] MS. WESTMORELAND: Thank you, Your Honor.

BY MS. WESTMORELAND:

Q. Doctor Katz, I believe at the previous, on, on Tuesday, we had also referred to a document which at that time was marked Respondent's 18, which was Table Roman Number 2.

And I don't know if we had submitted it or not. If we have, I'll withdraw the exhibit.

Would you refer to what you have labeled as Respondent's 18A, and give the heading for that table, please?

A. Yes. The heading of the table is "Counts of the Number fo Unknowns for Variables in the George Charging and Sentencing Study."

Q. And could you identify that table for us, please?



A. Yes. This is another table I prepared yesterday which counts the number of missing values indicated for the variables from the questionnaire items for the charging and sentencing study.

Q. Was that prepared from the most recent tape you have?

A. Yes, from the August 8 tape.

MS. WESTMORELAND: Your Honor, we would submit into evidence Respondent's 18a, referring to unknowns in the charging and sentencing study data at this time.

THE COURT: Let me make sure I understand it. How many cases were in the sample in the Georgia charging and sentencing study?

[1432] THE WITNESS: There were 1082 cases.

THE COURT: Is this a count, let's go down to plea bargain, which has had some discussion, which is LDF-40.

You show 445 unknowns. Does that mean that out of 445, excuse me, out of one thousand plus questionnaires, the plea bargain foil was not filled in in 445, or is that expanded to represent the universe?

THE WITNESS: I believe this particular unknown designation is the result of a code that was represented for that question, which I think was a zero code. And there was no explanation as to what that signified in the questionnaire.

THE COURT: I'm not sure I asked the question right.

What I want to know, does this mean to me that from the thousand plus questionnaires, there were 445 where that code was unknown, regardless of how it was coded?

THE WITNESS: Yes, of the—

THE COURT: On the basis of the universe of 2500?

THE WITNESS: No, I do not have information about specific plea bargain concerning the whole universe.

THE COURT: You didn't use their weighting?

THE WITNESS: No, I did not.



THE COURT: To expand on a stratified sample or any other basis. This is just a raw number?

THE WITNESS: Yes, Your Honor.

THE COURT: To say it another way, that would mean that [1433] about forty-five percent of those questionnaires had no information on plea bargain.

THE WITNESS: Yes.

THE COURT: All right.

MS. WESTMORELAND: We submit it, Your Honor, and ask that it be admitted at this time.

THE COURT: All right, Mr. Ford.

MR. FORD: Could I ask just a couple voir dire questions, Your Honor?

THE COURT: You may.

#### VOIR DIRE EXAMINATION

BY MR. FORD:

Q. Again on the label, "unknowns," is this what came off the tape, not the questionnaires, is that correct, these numbers?

A. These came off the tape, yes.

Q. And you don't differentiate here between the foils that are coded 1, 2, blank, "U", and the ones that are coded in other fashions, is that right?

A. That's correct.

Q. And where it indicates that some of the matters are undetermined, is that the places where there are foils and there was no information as to whether there might have been more—

A. There was no specific entry as to what "unknown" represents. There was no "unknown" entry that I could—

THE COURT: Count.

[1434] THE WITNESS: Count, yeah.

BY MR. FORD:

Q. And am I correct those are both in the foil situation?

A. Yes.

Q. Is that where both of those come in?

A. Yes.

MR. FORD: Again, Your Honor, with the reservation that our position will be ultimately that this is not relevant, I have no other objection at this time.

THE COURT: Well, I'm not in position to assess its statistical significance, but I think it is relevant as reflecting on the completeness of the data base, so I will admit it.

MS. WESTMORELAND: Thank you, Your Honor.

THE COURT: I might note in that ruling that some, I don't mean to infer that I think that all of these ought to be zero. Some of these are measuring things, well, no, excuse me, these are unknowns, these are not present. All right, I'll admit it.

BY MS. WESTMORELAND:

Q. Doctor Katz, did you conduct a similar type of accounting, counting procedure in the charging and sentencing study and the procedural reform study for the items that you previously discussed as "other" items, the provisions in the questionnaire for an "other" designation?

[1435] A. Yes, I did.

Q. Could you refer to what has been labeled Respondent's Exhibit 19, and which also, I believe, has Tables Roman Number 2A and Tables Roman Number 2B on that exhibit and identify that for us, please?

A. Yes. This is Table 2A, "Counts of the Number of 'Other' Items of Variables in the Procedural Reform Study" which I prepared and counted the number of cases in which an "other" designation was given as one of the foils for the procedural reform study, and counted the number of cases where "other" was indicated as an item for the charging and sentencing study.

Q. That is—

A. So, for example, for the procedural reform study, I give the relevant question that's being referred to in the lefthand side column.

Then the second column I give the item number representing "other" response.

Then I give the number of cases in which that "other" response was designated.

And then I give a short description of the variables that the question is trying to relate to.

Q. So, do the columns under "question", then, refer to specific question or question numbers or response numbers in the questionnaire itself?

A. Yes.

[1436] Q. And where did you obtain these "other" information from, from the tape or from other items?

A. This particular table was done in terms of the tape I received in late January.

And Table 2B, I also counted the number of "other" cases for the charging and sentencing study, and generally there were two ways in which "other," "others" could appear. One as a particular distinct item, as is indicated in certain of these variables, and also "other" can appear as an option in one of the two foil questions.

And so on the lefthand side of the first column I refer to the particular item designation in the charging and sentencing study.

Then I give the count of the number of cases in which "other" was indicated.

Then I give a short description of the variable related to that.

Q. Did you make any examination of the data, the data base and the information you received, to determine if variables had been defined for the specific items?

A. Yes. And I could not see how any of this information was utilized, except in rare cases.

For the most part, this information was not put on the computer variables for the computer tape, and as far as I can tell, was not utilized in any analysis.

[1437] THE COURT: Let's be a little more precise about that.

Looking down at the charging and sentencing study, Mr. Boger, let me make sure I'm clear on something.

There are very few of Professor Baldus' tables that rely on the first study, is that correct or incorrect?

Mr. Boger: That's correct, Your Honor.

THE COURT: So we're primarily interested in the charging and sentencing study and secondarily on the triangulation notion of the other—

MR. BOGER: That's right, Your Honor.

THE COURT: Is that a fair statement of your—

MR. BOGER: I do think that's right. The place where the procedural reform study has the most relevance, of course, in the charging decisions, the decisions that take the case on to a penalty phase, and the decision of the jury at a penalty phase.

As to those, it represents the complete universe of cases in the time period that we're looking at. And almost all the "other" input is on charging and sentencing—

THE COURT: All right. Now let me ask you a few questions.

I notice that you have a 139 "other" responses in the variable "special aggravating features of offense."

Is it your testimony as to that item that that "other" data was not used in subsequent analysis.

[1438] THE WITNESS: That's correct. I do not recall any particular subdivision of these "other" items in terms of additional aggravating features that were defined in the computer codes.

THE COURT: Well, my question is, was the data utilized at all?

THE WITNESS: As far as I can recollect, no.

THE COURT: Would that also be true with victim mitigating circumstances?

THE WITNESS: I believe there was occasionally a question dealing with whether or not victim mitigating

circumstances were present or not, where this particular item was included with perhaps 13 or 14 other items.

But there was no attempt to break down the information contained in this response, LDF-306.

THE COURT: How about contemporaneous offense? Do you know if that was used?

THE WITNESS: I believe it was used in certain ways, but some of these "other" responses related to either other felonies or other misdemeanors, and I believe that that information was included in certain general variables relating to those areas.

THE COURT: How about defendant's motive?

THE WITNESS: I do not believe any of the defendant motive "other" items were utilized.

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DR. JOSEPH L. KATZ

(DIRECT)

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[1440] Q. Doctor Katz, in evaluating the data base, the data bases that you had available to you, did you do any comparisons between the two studies, that is, the Procedural Reform Study and the Charging and Sentencing Study?

A. Yes, I did.

There are 361 cases which have the same case numbers between the Charging and Sentencing Study and the Procedural [1441] Reform Study.

And in trying to evaluate the consistency of the data, I looked at variables that seemed to be related, closely related between those two studies to see how they were coded between the two studies for the same cases.

Q. And how did you make that determination, or what did you do in making that examination?

A. I merged the two files so that I could directly compare the 361 cases, and for a sample of about 30 or so variables that I've listed in the Table, I—



Q. And you mentioned Table, would you refer to Respondent's Exhibit 20A, which is a document that is not in the notebook at this time, and—

A. Yes. This is a table I prepared yesterday.

Q. What's the heading on that table?

A. "Table of Non-Match Counts."

Q. And was that prepared from the most recent tape available to us?

A. Yes, it was.

Q. Would you explain what you did in preparing this table?

A. In preparing this table for the variables described, I, for a particular case, I determined whether the outcome for that variable was the same. And if the outcome was not the same, I designated that a non-match.

And then for the cases, I then counted the number of [1442] non-matches for these particular variables.

On the lefthand side after description of the variable that's being represented, the second column gives the total number of non-matches that were found.

The third column gives the percent of the 361 cases that these non-matches represent.

The fourth column gives the procedural reform study variable that I utilized.

And the fifth column gives the charging and sentencing variable that I utilized to compare for this particular variable.

Q. You indicated that you compared to see if the responses were a non-match.

What particular things were you comparing? If my recollection is correct, the procedural reform study had in certain cases a yes or no type designation whereas the charging and sentencing study had a provision for four specific responses.

How did you make that particular comparison?

A. I was particularly concerned with the ultimate way in which this variable would be classified. And in the charging and sentencing study, I, I coded things in terms of how Professor Baldus had ultimately coded this



variable. And that is using his convention of designating "U's" and blanks to be zeroes, and 1's and 2's to be coded as 1 for a particular variable.

[1443] In the procedural reform study variable, I used the, specifically the variable that is indicated, in that these are for the most part, zero—1 variable, zero indicating that the variable is not present in the case, 1 indicating that it is present.

So I was matching, or testing matches for what ultimately I believe was used in the analysis by Professor Baldus.

Q. In making these comparisons, how did you determine which particular variables or which particular items to compare?

A. I tried to pick items that were almost precisely defined the same in the two questionnaires, and to eliminate any judgment on my part, I listed the statutory aggravating circumstances, and then, for example, an item like slashed throat, would be, that option would be the same for the charging and sentencing study and the procedural reform study questionnaire. The indication would be slashed throat.

So I compared whether a case had that attribute coded or not. So the "12" indicates there were twelve cases where the codings were not identical out of the 361 cases.

Q. In making these comparisons, did you make any legal judgment or any other kind of judgment as to what would be equivalent?

A. I tried to restrict this to questionnaire items in which no legal judgment would be required, other than perhaps a judgment, assuming that homicide, at the time of the homicide, is the same [1444] as the time of the killing. Those kinds of word changes.

I tried to make these items, these variables that I've listed, the items that are the same between the procedural reform study and the charging and sentencing study in the way it's designated on the questionnaires.

MS. WESTMORELAND: Your Honor, at this time, we would like to submit Respondent's Exhibit 20A, the table of non-match counts, into evidence, for the purpose of illustrating that there are at least apparent inconsistencies between the two studies.

I don't believe Doctor Katz is indicating either one is necessarily right or wrong in his judgment. He's just indicating he's done a computer count and found these inconsistencies. And for that purpose we would like to ask that it be admitted.

THE COURT: Mr. Ford?

MR. FORD: Could I have a couple questions, your honor?

THE COURT: All right.

### VOIR DIRE EXAMINATION

BY MR. FORD:

Q. Doctor Katz, what source did you use, then, to determine whether or not the variables were equivalent between the two studies?

A. The questionnaire, the descriptions on the questionnaires as to those variables.

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DR. JOSEPH L. KATZ

(DIRECT)

\* \* \* \*

[1447] Q. Doctor Katz, moving into, past the data and past the questionnaires themselves, did you do an analysis or did you evaluate the approaches utilized by Professor Baldus in analyzing the data in the procedural reform study?

[1448] A. Yes, I did.

Q. And what approach did you take in your evaluation of these analyses?

A. I considered, after, after reading his early documents that were given to me, I had concluded that his hypothesis was a statistical hypothesis based on a level of aggravating and mitigating circumstances. In black victim cases and white victim cases.

To restate it, I believe it goes, Professor Baldus believed that the higher level of aggravating circumstances and a lower level of mitigating circumstances are tolerated in the Georgia charging and sentencing system for black victim cases, rather than white victim cases, before higher sentences are imposed.

Q. And where did you obtain that particular hypothesis?

A. That was stated in the preliminary report. So,—

Q. Was that a document you received in—

A. That was a document I received in November, 1982.

Q. And so did you proceed, based on that particular hypothesis to do any analysis?

A. Yes. I wanted to directly test that hypothesis, and the first thing I did was determine what Professor Baldus or tried to determine what Professor Baldus believed were aggravating and mitigating circumstances.

Q. Would you refer to a document that's labeled Respondent's [1449] Exhibit 23, Table Roman Number Six, and identify that document, please?

A. Yes. This is a—

THE COURT: Wait just a second, you're getting ahead of my absorption rate.

MS. WESTMORELAND: I apologize, Your Honor.

THE COURT: Give me that hypothesis again, the Georgia system tolerates higher levels—

THE WITNESS: Of aggravation and lower levels of mitigation in black victim cases, rather than white victim cases, before higher sentences are sought or imposed.

\* \* \* \*

[1453] Q. Doctor Katz, I would like to refer you now to, if you would look to Respondent's Exhibit 25, which is Table 8, and identify that document, please?

A. Yes. This is a document which I prepared in which I compared white and black victim cases in the procedural reform study in terms of all the variables that were defined in table six.

Left-Hand column I have the variable.

Q. By Table 6, you mean Respondent's Exhibit 23?

A. Yes.

Which is the list of the variables.

On the lefthand side are the variable names, whose interpretation is given in Table 6.

The second column is the number of white victim cases out of the total number of white victim cases that had the particular attribute.

The third column, labeled percent, gives the percentage of cases, white victim cases that had the attribute, aggravated battery.

Fourth column, labeled black victim, then does a similar count for black victim cases, and out of the 247 black victim cases 10 had aggravated battery.

The fifth column gives the percent related to that, the black victim cases.

Table, excuse me, Column 6 then gives the percent [1454] difference calculated by taking the percent of white victim cases minus the percent of black victim cases for that particular variable.

And then the last column is the "Z" value.

Q. And what is the the "Z" value?

A. The "Z" value is a standardized measure by which one could determine the probability that the observed percent differences are due to random chance.

Q. And would you refer then back to Respondent's Exhibit 24, Table 7, and identify that table, please?

A. Yes. In my analysis, I will be using the "Z" value frequently, and in the hypotheses that I will test, I will use the measure at the .05 level of significance.

However, in Respondent's Exhibit 24, I give a list of possible "Z" values, and the corresponding "P" values, or significance level that would be associated with those "Z" values.

It's difficult to compute a particular "P" value, given a high "Z" value, since the tables generally only give "Z" values up to 3, sometimes even 4.

This allows one to put the "Z" value in perspective.

So a "Z" value that is greater than 3, one can get some idea as to the relative significance of that value.

Now, I have positive "Z" values in Respondent's Exhibit 24 and negative "Z" values.

[1455] Q. Did you make the calculations involved in this table?

A. Yes. These calculations are approximate. It is very difficult to exactly determine what those probabilities are, but they are approximate.

Q. Did you do this by some standard formula that's utilized by statisticians or how did you compute these?

A. I computed these by noting that based on some mathematical theorems a certain coin tossing experiment can be related to the calculation of "P" values for "Z" distribution, and given that knowledge I was able to approximate what these "P" values are.

Q. And is this what you utilized in your later analyses, in determining statistical significance?

A. Yes. The important "Z" values, however, are the "Z" values of plus 1.645, and minus 1.645.

Q. And why are those important?

A. If we get a "Z" value of plus 1.645, that will mean that at the .05 level of significance, white victim cases have more of that attribute than the black victim cases.

If we achieve the "Z" value of minus 1.645 or less, that will mean that black victim cases had more of that white victim cases at the .05 level of significance.

MS. WESTMORELAND: Your Honor, merely for the purposes of illustrating the values Doctor Katz used in



his later analyses, I would submit Respondent's Exhibit 24 at this time.

MR. FORD: No objection, Your Honor.

[1456] THE COURT: It will be admitted.

BY MS. WESTMORELAND:

Q. Doctor Katz, referring back to Respondent's Exhibit 25, and then also, if you would look at the next document labeled Respondent's Exhibit Number 26, which is Table 9, what are the differences in these two tables and would you identify first Respondent's Exhibit 26?

A. Respondent's Exhibit 26 is Table 9, is a comparison of white and black victim cases for the procedural reform study in which I selected variables from the previous table, Respondent's Exhibit 25, that show statistical significance at the .05 level of significance.

For those variables, I then categorized them as to whether the "Z" values were positive, that means greater than 1.645, negative, less than minus 1.645.

I then categorized them in terms of whether white victim cases showed more of that attribute or black victim cases showing more of that attribute.

So for example, the variable armed robbery, we refer back to the Respondent's Exhibit 25, in the armed robbery case there were forty percent of the white victim cases in which an armed robbery was a contemporaneous offense and there were 18.2 black victim cases in which armed robbery was a contemporaneous offense.

Q. 18.2 percent?

[1457] A. Percent, yea, the difference was 21.8 percent, and the "Z" value associated with that, was 5.693. So the indication of armed robbery 5.693, refers to the previous table where armed robbery—

Q. You mean in Respondent's Exhibit 26, that indication?

A. That indication is that white victim cases have a higher proportion of armed robbery present than black



victim cases, and it's significant at the .05 level of significance.

Q. And is that the representation made in both of these tables, as your calculations?

A. Yes, it is.

For the total variables, however, I utilized a slightly different approach. Since these were not attribute variables, I compared mean differences.

THE COURT: Wait just a minute, now. What—if I go over to about the third page, do I pick up the first total variables?

THE WITNESS: Yes, Your Honor.

THE COURT: Okay.

THE WITNESS: As an example, under the category, special aggravating features of the offense, I have the variable AGGCIRX, which counts the number of aggravating circumstances present at the offense out of a large list of possible aggravating circumstances, and the mean number overall, the white victim cases was 2.831. The aggravating—excuse me, Your Honor.

[1458] THE COURT: I'm not with you in terms of where you are.

What page are you on?

THE WITNESS: Third page of Respondent's Exhibit 25, Your Honor.

THE COURT: All right. About where on the page?

THE WITNESS: The middle of the page.

THE COURT: All right. Heading?

THE WITNESS: Special Aggravating Features of the Offense.

THE COURT: Okay. I see it.

THE WITNESS: AGGCIRX is the variable name.

The mean number of aggravating circumstances overall white victim cases, is 2.831, and the mean number of aggravating circumstances overall black victim cases, is 1.964.

And the mean difference is calculated and the "Z" value associated with this mean difference is presented.

BY MS. WESTMORELAND:

Q. And then did you make the same determinations for those particular variables in accumulating the information on Table 9?

A. Excuse me, would you repeat the question, please?

Q. Yes. We talked about the attribute variables. With regard to the total variables, did you also take the significant "Z" values and move them to Table 9 as well?

A. Yes, I did.

Q. Did you make any kind of determination or judgments in [1459] creating Table 9 from, I'm sorry, Respondent's Exhibit 26, from Respondent's Exhibit 25?

A. No. I simply selected those variables that were significant at the .05 level of significance, and the classifications had already been provided for in Table 6 and I simply represented them in Table 9.

Q. And in making this representation in Table 9, what is shown?

THE COURT: Now, wait a winute, what is Table 9?

MS. WESTMORELAND: I'm sorry, Your Honor. Respondent's Exhibit 26.

THE COURT: Is that what we've been looking at?

MS. WESTMORELAND: It's the second of the two tables, Your Honor.

THE WITNESS: It shows there are a lot of variables, aggravating variables in which white victim cases have a higher proportion of that variable than black victim cases.

And there are a great deal of variables in which, pardon me, mitigating factors, in which black victim cases have a higher proportion or a higher average number of those mitigating factors, than white victim cases.

\* \* \* \*

[1484] Q. Could you please describe or tell us what the purpose of an index method in general is?

A. The purpose of an index method is to devise some standard by which observations of cases will be judged for the purpose of ranking these cases appropriately.

Generally an index is an artificial measure of some process in which no easily obtained measure is available to, to allow for that process or to measure that process.

Q. And what does the index method determine? What is developed by these indexes?

A. The purpose of the index is to rank different cases, or different observations so that one could conclude that perhaps one case was, had more of that attribute or more of that measure than another case.

Q. What kind of outcomes are determined by the index method?

A. The index method is trying to provide an artificial ranking.

In this case, the indexes were used for, an index trying to control for aggravating and mitigating circumstances. So the outcomes would be numbers that purport to represent the degree or level of aggravation and mitigation in each case for the purpose of ranking these cases according to those numbers.

THE COURT: I understand the concept, but it is not clear to me as what indices of Professor Baldus' does this [1485] address.

BY MS. WESTMORELAND:

Q. Doctor Katz, could you address—are you—

THE COURT: Or which.

BY MS. WESTMORELAND:

Q. Doctor Katz, are you addressing particular indices at this point or the index method in general?

A. At this point the index method in general.

Q. And have you addressed any specific indices and analyzed any of those particular indices?

A. Yes.

MS. WESTMORELAND: I think, Your Honor, at this point the purpose is merely a general discussion of the index method.

BY MS. WESTMORELAND:

Q. Does the index method utilize a predicted outcome or an actual outcome or what type of value in that regard?

A. There are many different ways one can construct an index. Professor Baldus has used regression analysis to develop his indices.

What he, what I believe he has done is he has run regression analyses and used a predicted outcome which were the result of the regression analysis to form his index for aggravation and mitigation.

Q. What would be the difference in a predicted outcome and an actual outcome in that context?

[1486] A. The actual outcome is the outcome that has been observed for the particular variable.

The regression provides a model for that actual outcome, and from that model, will give a predicted outcome, based on the independent variables that it has to work with.

Q. Would you refer to Respondent's Exhibit 39, which is Table 21A, Doctor Katz, and identify that document, please?

A. Yes, Respondent's Exhibit Number 39 gives a series of regressions that I ran for the first one hundred cases in the procedural reform study.

THE COURT: Huh?

THE WITNESS: For the first one hundred cases in the procedural reform study.

BY MS. WESTMORELAND:

Q. Are these regressions that you developed or how were these regressions obtained and what was the purpose of doing this?

A. The purpose—

THE COURT: Excuse me. What table are you on?

MS. WESTMORELAND. Table 21A, Your Honor, Respondent's Exhibit 39. It should be in the notebook.

THE COURT: All right.

THE WITNESS: The purpose of these regressions is to show how the index method can be shaped to give different rankings for, for different cases. These regressions are only for the purpose of demonstration rather than as a measure of an [1487] actual aggravation-mitigation index.

Q. Is this—go ahead. I' sorry.

A. And I limited it to a hundred cases so that the number of observations that I would have to tabulate in the tables would be limited to only a hundred and not burden me and others with all 607 observations.

So for purposes of illustration, showing how the index method would respond to Professor Baldus' use of predicted outcomes.

Q. And then in relation to this, and what you have done with this particular table, could you explain how the regression fits into the index method?

A. Yes. If we look at the regression under the title "Regression 1" as an example, this is a regression which results from using the variable X481C, which is a variable for whether or not a death sentence was imposed. As a dependent variable, and the use of six different variables representing aggravated battery, aggravated motive, and so forth.

Now, regression analysis tries to explain or model the dependent variable, in this case, being the death sentence outcome, by the independent variables that it's given. And it does this by trying to make the predicted outcomes, which are the outcomes that would be obtained for each of the individual one hundred cases after applying these weights in terms of what features of the offense were present in those cases, and summing [1488] up



these weights and trying to have these weights as close as possible to the actual outcome.

So for example, if we had a death sentence case, the value for X481C would be 1, and if in that death sentence case was present an aggravated motive and burglary, which is B-U-R-G-A-R-S, as the two variables, then the predicted outcome for that case would be .10; the constant term, nothing, no weight would be added in terms of the aggravated battery variable, A-G-G-B-A-T-T since it did not occur in this particular case, then .35 would be added for the aggravated motive variable, A-G-G-M-O-T, and .38 would be added for the burglaries variable, B-U-R-G-A-R-S.

The other three variables would have zero values and so those witnesses wouldn't be counted. So the resultant predicted outcome for this particular case, would be the sum of .10 plus .35, plus .38, which I believe is .83.

Now, the criterion by which these weights are assigned is based on the criterion that overall observations choose the weights or co-efficients that minimize the sum of the differences between the predicted outcomes and the actual outcomes, squared.

The reason the squaring procedure is employed is to, is the same reason that's used in the computation of variance, so that we're minimizing the sum of positive values and we don't have positive and negative values cancelling out.

[1489] Q. In this particular experiment that you've conducted, what is the significance of the later regressions that you've listed or provided?

A. The later regressions are regressions where additional variables were added to the set of independent variables, and for the purpose of raising the R-squared value.

Q. I notice you utilize R-square in each of these regressions, and we talked about R-square in some of the other witnesses' testimony.



Could you give a brief explanation of R-square and its significance?

A. The R-squared is a measure of how close the predicted outcomes reflect the actual outcomes, and it's essentially the proportion of variation of, as explained by the regression model in its predicted outcome, in terms of the actual outcome, in terms of the variation of the actual outcome.

The purpose of regression is to try and make the predicted outcomes be as close as possible to the actual outcome. If one is successful in doing that, one might say they have a regression equation that models the system, and hopefully has variables and co-efficients that represent the relative importance of these variables to the system.

The R-squared is a measure of how successful one has been in having the predicted outcomes become very close to the actual outcome.

[1490] The higher the R-squared, the closer the predicted outcomes are to the actual outcome over all the cases that are being considered.

Q. Let me backspace just a moment.

What is the difference between an adjusted R-squared and an unadjusted R-squared?

A. A unadjusted R-squared does not take into account the number of variables that are used in the set of independent variables. It's, the unadjusted R-squared is not truly a measure of the variance, the explanation of the variance. That's what the adjusted R-squared does. But the unadjusted R-squared is generally utilized because we have a convenient test to test the significance of that R-squared value.

Generally these values are approximately the same. If you have a large number of variables in your model as compared to the number of observations, then the adjusted R-squared could be significantly lower than the unadjusted R-squared value.

Q. Why might that occur?

A. Because the adjusted R-squared value is truly a relative proportion of variance rather than variation of sum of squares.

For most models, if the number of independent variables compared to the total number of observations is a very high percentage, the unadjusted R-squared and the adjusted R-squared will have comparable values.

Q. I believe you were discussing the specific regressions that [1491] you had listed in your experiment, and the purpose of these additional regressions.

What is the purpose of regressions 2 through 5 and what do they show in regard to regressions in general?

A. Professor Baldus has employed his index method by utilizing the predicted outcomes for a particular regression.

I believe the statistical significance or meaning of this index has to be put in terms of how the rankings that result from predicted outcomes can be affected by a set of independent variables that's used in the regression model.

Furthermore, I also point out that as the R-squared value increases, what results are index values that rank death sentence cases close to 1 and life sentence cases which have zero values for X481C close to zero.

Q. And then do you, would you look at respondent's Exhibit 40 and identify that document please?

A. Yes. This is a Table I prepared in which I compared the predicted outcomes for each of the regressions indicated on Respondent's Exhibit Number 39.

The first category of cases are the life sentence cases. Now I selected the first one hundred cases from the procedural reform study and listed on the lefthand side under "case" the case number.

Then I list the actual sentence outcome and for life sentence cases they all should be zero.

[1492] And then I list the predicted outcome that would be generated by Regression 1 and Regression 2, and Regression 3, and Regression 4 and Regression 5.

Q. And what, I'm sorry, go ahead.

A. The second page contains a continuation for the life sentence cases, with the appropriate index predicted outcome demonstrated.

And then the third page is the predicted outcomes for the death sentence cases for each of the five regressions.

Q. Could you explain the significance of these tables in light of the experiment you're discussing that you ran?

A. When Professor Baldus ran his regression analysis and built his indexes, he noted that there were many cases that had predicted values somewhere in the middle.

Q. By in the middle, what do you mean?

A. Mid-range cases, cases where there were death sentence cases that were close to .5 or lower; life sentence cases that were close to .5 or larger, and he interpreted this to mean that the system had a difficult time discriminating between these cases as to whether a death sentence should be applied or not.

Q. And how does your experiment relate to that?

A. Well, from my analysis, it appears that this, this mid-range of cases can be eliminated as long as one has a regression model in which the R-squared is sufficiently high.

Q. Could you give an example by looking at Respondent's Exhibit [1493] 40 what you're referring to?

A. Yes. If we look at say Regression 1, in this case, according to Respondent's Exhibit Number 39, it—

THE COURT: What page are you looking at?

THE WITNESS: Table 21A. Your Honor.

THE COURT: Page? Respondent's Exhibit 40?

THE WITNESS: Yes, and Respondent's Exhibit 39.

BY MS. WESTMORELAND:

Q. Okay, which particular page of Respondent's Exhibit 40 are you referring to, Doctor Katz?

A. The first page of Respondent's Exhibit 40.

If we look at the predicted outcomes for these cases, utilizing Regression 1, which R-squared was .26, we see a wide variation of the possible index values.

And looking at page 2, down the first column, there's again a wide range of values. Some of these values even achieve a predicted outcome of .70 as in the case of Case Number 066 at the bottom.

Q. By a wide range of values, could you give us an example in the table what you're referring to?

A. Well, some of these predicted outcomes have values as low as  $-.23$  and other cases have predicted outcomes that are as high as .70.

Q. Would you take a specific case and explain what you're referring to, please?

[1494] A. On the second page of Respondent's Exhibit 40, Case Number D11, has a predicted outcome of  $-.23$ .

Q. That's with which regression?

A. That is for Regression Number 1.

Q. Out of Respondent's Exhibit Number 39?

A. Yes. Whereas Case 066 has a predicted outcome of .70. If we look at page 3 of Respondent's Exhibit 40, where we look at the index values or predicted outcomes for the death sentence cases, we again see a wide range of values. There are cases such as Case Number Z15 in which a predicted outcome of .100 is indicated, and there are cases in which a very large value is indicated, such as Case Number D18, with a .90 value.

Now, there are some life sentence cases which have higher index values than death sentence cases, and there are some death sentence cases that have lower, that have lower index values than life sentence cases.

The point is that there is a middle range of cases where life cases and death sentence cases are mixed up in terms of the predicted outcome index values.

This has been—

THE COURT: On Regression 1 or across the board?

THE WITNESS: On Regression 1, Your Honor.

BY MS. WESTMORELAND:

Q And how does that, does that change in any way in the subsequent regressions that you utilized in your experiment?

[1495] A. Yes. I then ran Regression 2, where I added additional variables to the set of independent variables and achieved an R-squared of .59 as indicated on respondent's Exhibit Number 39.

Then I listed the predicted outcomes for index values that would be associated with the results from Regression 2.

And what I observed is that the amount of differences between the numbers are less.

Q. Between which numbers?

A. Between the index numbers for predicted outcome numbers for the life sentence numbers. They tend to be closer to the zero value, which is their, the sentencing outcome we're trying to predict, although there are some cases that do have large index values.

Then if we look at the death sentence cases on page 3 of respondent's Exhibit 40, we find that the index values for these cases tend to be larger, although there are still some cases which have low index values as compared to the life sentence cases.

So even in this regression, we would have a set of cases in the middle in which we would have death sentence cases having lower index values than life sentence cases.

So this regression has not completely separated out the life and death sentence cases.

If we move on to Regression Number 3, from Respondent's Exhibit Number 39, I've added additional independent variables.

[1496] THE COURT: I have the point. I figured out what happens as you go across.

Let me ask, what is included in Regression 1 and what is included in Regression 5? Anybody able to tell me? Have you, let me ask this.



Looking at 39, you've got a number of independent variables, such as aggravated battery, aggravated motive, burgars, which I suppose means burglary; or burglary-arson.

THE WITNESS: Burglary or Arson, Your Honor.

THE COURT: Okay. I don't know what the next one is. Anyhow, using the same independent variables on Exhibit 40 for Column 1 for all the cases?

THE WITNESS: Yes.

THE COURT: What have you, have you put in your model. Regression 5? Do you know what those mean?

THE WITNESS: Yes, Your Honor.

THE COURT: What is "bright?"

THE WITNESS: The defendant had an I.Q. of one hundred or greater.

THE COURT: All right, and that's burglary-arson. What is "defem?"

THE WITNESS: The defendant was female, Your Honor.

THE COURT: "Dull?"

THE WITNESS: I believe that's the defendant had an I.Q. between, or less than 65, Your Honor.

[1497] THE COURT: "Kidnap" means that—

THE WITNESS: The kidnapping has a contemporaneous offense to the homicide.

THE COURT: And "mulsch" is multi-shooting, I believe.

THE WITNESS: Multiple shots to the head.

THE COURT: And the next one, "mutil?"

THE WITNESS: "Mutil" is mutilation.

THE COURT: Mutilation. What does "noarrest" mean?

THE WITNESS: I believe the motive for the killing was to resist arrest or not to be arrested.

THE COURT: What is "nokill"?

THE WITNESS: Defendant was not the trigger man.

THE COURT: And "nonperm"?



THE WITNESS: The motive for the crime, for the killing was a nonprofit crime motive.

THE COURT: Next one?

THE WITNESS: No violent personal crimes.

THE COURT: Old victim?

THE WITNESS: The victim was 65 or older.

THE COURT: Statutory aggravating circumstances?

THE WITNESS: Yes, sir, Your Honor.

THE COURT: Rape. Serious crime.

THE WITNESS: Yes, Your Honor. Total number of serious crimes.

THE COURT: Connected with, or prior record.

[1498] THE WITNESS: Prior record, I believe.

THE COURT: What is the "STMIT2"? Statutory and mitigating?

THE WITNESS: I believe that's what it is, Your Honor.

THE COURT: Two victims. The violence was unnecessary to carry out the felony.

THE WITNESS: Yes, Your Honor.

THE COURT: It was an urban case.

THE WITNESS: Yes, Your Honor.

THE COURT: The victim was a criminal.

THE WITNESS: Or criminal record.

THE COURT: What is "VICDEFS"?

THE WITNESS: The victim was defenseless.

THE COURT: What's that next one?

THE WITNESS: Victim was a policeman or fireman.

THE COURT: What is "VICPLEA," pled for mercy?

THE WITNESS: Yes, Your Honor.

THE COURT: The next one?

THE WITNESS: I believe that's the number of victim mitigating circumstances—something to do with victim mitigating circumstance. I believe the number of them.

THE COURT: What's the next one?

THE WITNESS: Whether or not a violent personal crime had been in his prior record, the defendant's prior record.

THE COURT: And the next one?

[1499] THE WITNESS: The number of violent personal crimes.

THE COURT: In the victim's prior record?

THE WITNESS: Yes, sir. Excuse me, in the defendant's prior record.

THE COURT: It says the per crime?

THE WITNESS: I believe that's violent.

THE COURT: Okay. The next one?

THE WITNESS: That distinguishes whether or not a precipitating event occurred at the time of the homicide.

THE COURT: And premeditated, I guess.

THE WITNESS: The killing was premeditated.

THE COURT: All right.

BY MS. WESTMORELAND:

Q. Doctor Katz, —

MS. WESTMORELAND: I'm sorry, Your Honor.

THE COURT: Go ahead.

BY MS. WESTMORELAND:

Q. Doctor Katz, did you utilize any specific method in choosing the factors to add into these regressions?

A. No. I simply wanted to demonstrate that as the R-squared increases, the actual, the predicted outcomes will become closer and closer to the actual outcomes.

And the purpose of this was to show that at any stage, what is happening with the regression in terms of the independent variables it has available to it, is that it is [1500] trying to weight the variables or assign coefficients to the variables so that the predicted outcomes for the life sentence cases will have zero values and the

predicted outcomes for the death sentence cases will have one value, regardless of the independent variables that it has to work with.

MS. WESTMORELAND: Your Honor, at this time, I would like to submit Respondent's Exhibits 39 and 40 to illustrate Doctor Katz' testimony as an experiment he has conducted and for that purpose only.

MR. FORD: Certainly as an experiment, we would object, Your Honor. This is as I understand it, is not the whole data set. This is not on the data in this case, this is a hand picked sample.

I'm still not clear as to how Doctor Katz came up with these variables, whether he threw at a dart board, let the computer choose them or what. But it doesn't seem to me, this is a purely illustrative thing to say something about regression equations in general, and how they work on small, manageable data sets. I don't know that this is an experiment that has anything to do with this case. I certainly object on this foundation.

MS. WESTMORELAND: I believe I asked that it be introduced to illustrate Doctor Katz' testimony in this regard, and perhaps "his experiment" is not a very good choice of words.

[1501] THE COURT: Well, experiment in the inter-relationship of number variables and R-square, yes; experiment to demonstrate anything about the entire data set, no.

MS. WESTMORELAND: That's not the purpose, Your Honor. It's to illustrate the testimony concerning R-squareds and regressions.

THE COURT: For that purpose, it's admitted.

MS. WESTMORELAND: Thank you, Your Honor.

BY MS. WESTMORELAND:

Q. Doctor Katz, how do regression equations react to errors in the predictor variables that may appear?

A. Well, the regression equations treat the information it has as only, ignores the errors and just goes by

the rule of trying to minimize the sum of the square of the differences between the actual and predicted outcomes.

So if there are errors that are introduced into the set of variables, the regression that results from that analysis can be faulty and can be subject to a great deal of error.

Q. What would be generally accepted statistical procedure in utilizing regressions insofar as treating unknown values?

A. I believe there is a problem in using regression in the kind of analysis performed by Professor Baldus because there are a great deal of unknowns.

The unknown values were coded to have zero values, and the usual statistical method of dealing with unknowns is to omit [1502] those observations in the performing of the regression analysis.

It is hoped that when regression analysis is run that there are very few independent or dependent variables that would have missing values.

Since in the data set that Professor Baldus had available to him there were a great deal of missing values, and his regression had been performed where those values had been indicated as missing, using the standard convention of omitting observations in which even one missing value is indicated for an independent or dependent variable, there would have been very few observations left in which the analysis could have been conducted with.

THE COURT: Are you about to change subjects?

MS. WESTMORELAND: Yes, Your Honor.

THE COURT: Let me ask you a couple of questions about that piece of testimony.

BY THE COURT:

Q. Do you understand, as do I, that a coding of "U" meant that there was some evidence in the file to indicate that that variable might be implicated in the case, but the coder was unable to make a conclusive determina-

tion and so he put a "U" there. It is not like not existent, in other words?

A. Yes, Your Honor. That's my understanding.

Q. So in giving the testimony, that is the understanding that you are operating on?

\* \* \* \*

[1549] THE COURT: Particularly I'm interested in what if any observations he has on race of defendant effect.

THE WITNESS: That I believe, will be Respondent's Exhibit 61.

In Respondent's Exhibit 61, in which all cases are broken down by defendant-victim racial combination, there appears to be a pattern based on the defendant-victim racial combination effect. And if I can cite some of these categories, [1550] such as contemporaneous offense, and cite some of the numbers, when a black defendant kills a white victim, 67.1 percent of the time armed robbery is present.

When a white defendant kills a white victim, 20.2 percent of the time armed robbery is present.

6.6 percent of the time when a black defendant kills a black victim.

And 22.2 percent when a white defendant kills a black victim.

I computed some measures of significant differences, but that would have required many more tables and I've avoided them here, so I've left it overall as the percentages.

Then to cite a mitigating variable, perhaps page, Page 4 of this exhibit, under the category of special precipitating events, indication of of the relationship between defendant-victim racial combination.

The first variable represents barrom-lover quarrel, and it's spelled B-L-V-I-C-M-O-D, and in in this case, when black defendants kill white victims, only seven and a



half percent of time is this precipitating circumstance present.

When white defendants kill white victims, it's 43.6 percent.

When black defendants kill black victims, 65 percent.

When white defendants kill black victims, it's 45.8 percent.

[1551] THE COURT: I can read the tables, but as to the death penalty on this analysis, whichever table that one is, did you observe any race of the defendant effect?

THE WITNESS: Overall, it appears to me that in reviewing this table, that black defendants killing white victims tend to have more aggravating circumstances and less mitigating circumstances than white defendants who kill white victims. And in turn they have more aggravating circumstances and less mitigating circumstances in cases where black defendants kill black victims.

THE COURT: Now what? Where the victim is black, which series is more aggravated?

THE WITNESS: When the victim is black, that generally refers to a case where a black defendant kills a black victim and overall this table suggests that's the most mitigated time of murder. That is suggested by the 471 cases where a black defendant kills a black victim, to 27 cases where a white defendant kills a black victim.

THE COURT: You said mitigating, you didn't say infrequent. What are you looking at?

THE WITNESS: I'm sorry, Your Honor. I thought I was, you were—

THE COURT: I don't know what you're viewing. 61?

THE WITNESS: Yes, Respondent's Exhibit 61.

THE COURT: ~ Page?

[1552] THE WITNESS: What page?

MS. WESTMORELAND: Which page number of the exhibit is it, Dr. Katz?

THE WITNESS: Oh, excuse me. I guess all the pages I find give an overall impression of what the patterns of, are represented by these numbers.



THE COURT: Are you saying that a killing across racial lines usually results in a more aggravated less mitigated case, and killing along racial lines usually results in a less aggravated more mitigated case?

THE WITNESS: I don't think it generalizes quite like that.

I believe when a black defendant kills a white victim, that tends to be the most aggravated circumstance as compared to the other defendant-victim racial combinations.

Whereas it appears that the 27 cases where a white defendant kills a black victim, they don't appear to be as aggravated as when a black defendant kills a white victim, or as numerous.

BY THE COURT:

Q. Well, obviously they're not as numerous. But your observation is it's not as aggravated?

A. Yes.

Q. How about mitigation? Which is more mitigated?

A. The most mitigated of these defendant-victim racial [1553] combinations is when a black defendant kills a black victim.

\* \* \* \*

DR. ROGER L. BURFORD

(DIRECT)

\* \* \* \*

[1635] In general, I don't believe that it is possible to prove in a strict sense anything either pro or con, by the use of statistics. You can provide evidence, for example, to the effect that there is discrimination or there is not discrimination, but this does not constitute proof in a strict sense.

Q. Would you explain what is meant generally by the concept of statistical significance?

A. Okay. Significance is a term that is used by statisticians rather broadly in a very specific sense. When it is said that, for example, a regression co-efficient is significant at a .05 level, what that says, essentially, is that the regression co-efficient that is observed is different enough from zero that it would be unreasonable to conclude that it is exactly equal to zero, but it actually says nothing about what the specific value of that regression co-efficient is, or, for example, if it said that the means of two, two arithmetic means are significantly different, all it's saying is that their difference is large enough that you could not say reasonably that the true means of that unknown universe are exactly equal.

It doesn't say anything about the substantive significance. It only says that they're not, or they could not reasonably be said to be exactly equal. Doesn't say how different they might be.

Q. What is your opinion on the use of regression type analyses, [1636] or what problems are there with the use of regression type analyses in research or studies such as that involved in the instant case?

A. Regression analysis is right now, I think, probably the most frequently used kind of statistical analysis in a wide range of types of problems, including studies on discrimination.

It probably is also the most frequently abused or mis-used methodology.

First of all, it should be recalled that simply because two variables are closely correlated or closely related to one another, that says nothing at all about causation.

There have been, for example, the old stories about the relationship between increases in Baptist preachers' salaries and increases in alcoholic beverage consumption. That doesn't necessarily imply that there is a causal relationship there.

Second, the results of the regression analysis or any other statistical analysis for that matter, can never be any more valid than the data that went into the analysis.

You say, okay, garbage in, garbage out. If the data are not completely valid, then the results of the analysis are questionable.

Furthermore, it is possible, in fact even very likely that if you have a fairly large number of variables that are totally unrelated with each other, that are generated completely at random, that it is possible to derive a regression equation which has a reasonably good statistical fit in the sense of [1637] statistical significance and R-squares. I'm sure R-squares have been discussed here.

And yet, and even to have significant regression coefficients on most of the variables, and yet it's known in advance that these data are totally unrelated to each other.

Q. Would such a regression equation have any meaning?

A. It would have absolutely no meaning, and yet, there are fairly high co-efficients, fairly high R-squares. And yet no meaning at all.

In fact, I just saw a copy of a recent study that was done where precisely this thing was done. A, something like fifty variables were generated purely at random, and independent of one another, a hundred observations for each variable, and then a regression analysis was run on these, and a stepwise regression procedure was used.

First of all, all fifty variables entered into the analysis and a stepwise procedure was used to reduce the number of variables down to something like twenty, and the model looked like a real model with significant coefficients, significant R-squares and the whole thing, and yet the data were all totally fictitious and totally made up.

This is entirely possible with regression analysis and you have to be aware of it.

Q. You mentioned regression co-efficients and discussion has been had about that.

[1638] What is the meaning of the regression coefficient itself?

A. Ostensibly the regression co-efficient measures the impact of the particular independent or predicted variable on the dependent variable.

I say ostensibly because, excuse me, it ostensibly measures that impact, net of all other variables. And I say ostensibly because it does measure that impact net of all the variables if the independent variables or predicted variables are totally uncorrelated, totally independent of each other.

If, however, there is any degree of intercorrelation among the variables, the regression co-efficients are somewhat distorted by that interrelationship and do not measure exactly the net impact of that independent variable upon the defendant variables.

Q. In a case in which you might have intercorrelated variables, in the sense that you're referring to, what meaning, excuse me, what meaning or significance could you attach to the regression co-efficients obtained in that type of equation?

A. You would have to view them with very great caution, because they are almost certainly distorted.

In many cases, the signs would even be reversed from what they should be, or you may have zero co-efficients where there should be larger co-efficients or you may have large co-efficients where they should be essentially zero.

[1639] So, the interpretation of the co-efficients themselves is very fuzzy in the case of a high degree of multicollinearity, or even a small degree of multicollinearity they are distorted.

Q. What are the underlying assumptions behind, behind regressions and the use of a regression type of analysis?

A. Well, from a purely statistical point of view, if the regression analysis is to apply, ideally we would assume that all of the independent variables are totally independent of one another. That they are independent of the residual term, that is, the difference between esti-

mated values or predicted values and actual values of the dependent variable, the residual is normally distributed with a zero mean, and a constant variance at all levels.

This implies that the dependent variable is a continuous variable, that if, in fact, the independent variables are uncorrelated, and uncorrelated with the residual term, if the normal term is normally distributed, then this implies that the dependent variable is also normally distributed, which means it's a continuous variable over a fairly wide range.

Q. How far could one deviate, or is that something that's possible to answer, how far could you deviate from these assumptions and still have a meaningful regression?

A. It's hard to say. Regressions are run, generally, on, or very frequently, on data that don't meet all of the assumptions.

As a matter of fact, I guess most of the time, the data [1640] don't meet all of the assumptions, and exactly how far you can deviate without totally destroying the analysis is hard to say.

In the present case, the regressions that were run, the dependent variables were binary variables, zero—1 variables, generally, which certainly are not normally distributed.

In the present case, all or most all, if not all, of the independent variables were categorical type variables or binary variables, which doesn't necessarily cause you problems, and in the present case, there is certain to be a fairly high degree of multicollinearity among a large number of the variables, including race of victim and various aggravating or mitigating circumstances, as I think the tables that I saw that Doctor Katz had done indicated that there would be a fairly high degree of relationship between, say, race of victim and many of these aggravating and mitigating circumstances.

Q. Could this multicollinearity problem be accounted for by use of a factor analysis?



A. If a factor analysis is run that includes, well, of course, we do have problems with the factor analysis there, too, but I'll comment on that in a moment.

But if the factor analysis includes the race of victim and the race of defendant variables, that is, if it includes all of the dependent, excuse me, all of the independent variables in the analysis, as well as the dependent variables in the analysis, then it is possible to take account of and correct for [1641] multicollinearity.

However, if the dependent variable and key independent variables were not included in the factor analysis, then nothing actually has been done, because the factor scores themselves are highly correlated with certain of the independent variables that were not included within the factor analysis.

THE COURT: Wait a minute. I don't understand what you just said, and I want to. But let me make a little note, first.

BY THE COURT:

Q. Could you tell what you just said again in layman's terms?

A. Okay. A factor analysis can be used to derive a set of variables, sometimes referred to as latent variables or unobserved variables from the set of independent variables, and these latent variables are not correlated with each other. They are orthogonal. And what is done quite frequently is to get around the multicollinearity problem is to do a factor analysis and then do the regressions with the factor scores, or numbers computed from those factor relationships, used as independent variables.

This has a disadvantage that you can't directly, if you do it that way, you can't directly determine what the regression co-efficients are for the specific variables that you're interested in. You get the regression co-efficients for the factors.

. . . .



[1649] Q. You've discussed or you've mentioned multicollinearity several times during the testimony, and I don't really think we've gotten to this point, but what specific effects does that have on the regression co-efficients?

A. Well, if two or more co-efficients, if two or more variables of a dependent, excuse me, independent variables are correlated, then the effects that each of those two variables have on the dependent variable is masked to some degree. Each co-efficient does not give a net effect of that variable on the, on the dependent variable.

And therefore, it's not possible to really say exactly what the effect of that variable is on the dependent variable as a result of that interrelationship.

There's sort of a confounding effect that distorts the co-efficients.

Q. Doctor Burford, what is meant by the terminology of a standardized regression co-efficient?

A. A standardized regression co-efficient is a regression co-efficient with the effects of scale removed.

For example, if I were to do a regression analysis on a set of data and then I were to multiply the data by 10 and do another regression analysis, the co-efficient on the second set would be ten times as large as the co-efficient on the first set.

[1650] A standardized regression, or carry it a little farther, if I have two variables in the regression analysis, one stated in hundreds and another stated in thousands, I would expect that the co-efficient on that second variable will be considerably smaller than the co-efficient on the first variable, simply because of the effect of scale on those co-efficients.

Standardizing the co-efficients removes the effects of scales and puts them all on an equal footing. That way you can then compare the co-efficients on an equal basis, and determine which one is the more effective, and which one is less effective.

Q. What would be the possible effects of using, of not using standardized co-efficients in a case such as the instant case?

A. Well, it could make variables that are binary as compared to variables that have, well, let's say values that go from zero to ten, appear to be more, have greater impact than they actually do because of that scale effect.

Could I, could I elaborate on something I started to say while ago and I sort of got sidetracked on it?

Q. Certainly?

A. It was referring to the use of factor analysis to try to correct for the multicollinearity, and I indicated there are some problems with using factor analysis with this kind of data also.

Factor analysis has the unfortunate feature that it [1651] assumes that all of the variables are normally distributed. So you have a multivariate normal distribution.

And in this particular case, all the variables are categorical, and since they are all categorical, none of them are normally distributed, and consequently, factor analysis really doesn't apply anyway.

Q. What is your opinion on the usefulness of a stepwise regression procedure in this type of analysis?

A. Stepwise regression can be very dangerous. I sometimes feel that the development of stepwise regression in computer packages was a great disservice to, to statistics and to science.

What a stepwise regression does is to screen the variables that are included in the analysis and include those variables which make the greatest net contribution to, let's say, to the R-square, includes those co-efficients that are most statistically significant.

It knows nothing about what the nature of those variables is. It, whether these variables are variables that make any kind of logical sense or not is not taken into account by the stepwise procedure. It simply mechanically goes through the analysis. There are basically two variants of it. One is a forward stepwise and another one is a backward stepwise. The forward stepwise will take them one at a time and evaluate which ones will make the

greater contribution to R-square if included in the regression, with those variables that are already [1652] included there.

And backward stepwise just does it in reverse. It does a complete regression on all of them and then drops those that will reduce the R-square the least, considering all the rest of them ~~that~~ are in there.

And if the variables are highly intercorrelated, then the effect of this quite frequently is to drop variables that should not be dropped from a subject matter or substantive point of view and keep variables in that really make no sense at all from a subjective or conceptual point of view. So, it can be very misleading and can give you models that perhaps have relatively high R-squares and have significant co-efficients, but they don't mean anything.

. . . .

UNITED STATES DISTRICT COURT  
N.D. GEORGIA  
ATLANTA DIVISION

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Civ. A. No. C81-2434A

WARREN McCLESKEY, PETITIONER

v.

WALTER D. ZANT, RESPONDENT

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Feb. 1, 1984

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ORDER OF THE COURT

FORRESTER, District Judge.

Petitioner Warren McCleskey was convicted of two counts of armed robbery and one count of malice murder in the Superior Court of Fulton County on October 12, 1978. The court sentenced McCleskey to death on the murder charge and to consecutive life sentences, to run after the death sentence, on the two armed robbery charges. On automatic appeal to the Supreme Court of Georgia the convictions and the sentences were affirmed. *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980). The Supreme Court of the United States denied McCleskey's petition for a writ of certiorari. *McCleskey v. Georgia*, 449 U.S. 891, 101 S.Ct. 253, 66 L.Ed.2d 119 (1980). On December 19, 1980 petitioner filed an extraordinary motion for a new trial in the Superior Court of Fulton County. No hearing has even been held on this motion. Petitioner then filed a petition for writ of habeas corpus in the Superior Court of Butts County. After an

evidentiary hearing the Superior Court denied all relief sought. *McCleskey v. Zant*, No. 4909 (Sup.Ct. of Butts County, April 8, 1981). On June 17, 1981 the Supreme Court of Georgia denied petitioner's application for a certificate of probable cause to appeal the decision of the Superior Court of Butts County. The Supreme Court of the United States denied certiorari on November 30, 1981. *McCleskey v. Zant*, 454 U.S. 1093, 102 S.Ct. 659, 70 L.Ed.2d 631 (1981).

Petitioner then filed this petition for writ of habeas corpus on December 30, 1981. He asserts 18 separate grounds for granting the writ. Some of these grounds assert alleged violations of his constitutional rights during his trial and sentencing. Others attack the constitutionality of Georgia's death penalty. Because petitioner claimed to have sophisticated statistical evidence to demonstrate that racial discrimination is a factor in Georgia's capital sentencing process, this court held an extensive evidentiary hearing to examine the merits of these claims. The court's discussion of the statistical studies and their legal significance is in Part II of this opinion. Petitioner's remaining contentions are discussed in Parts III through XVI. The court has concluded that petitioner is entitled to relief on only one of his grounds, his claim that prosecution failed to reveal the existence of a promise of assistance made to a key witness. Petitioner's remaining contentions are without merit.

## I. DETAILS OF THE OFFENSE.

On the morning of May 13, 1978 petitioner and Ben Wright, Bernard Dupree, and David Burney decided to rob a jewelry store in Marietta, Georgia. However, after Ben Wright went into the store to check it out, they decided not to rob it. The four then rode around Marietta looking for another suitable target. They eventually decided to rob the Dixie Furniture Store in Atlanta. Each of the four was armed. The evidence showed that Mc-



Cleskey carried a shiny nickel-plated revolver matching the description of a .38 caliber Rossi revolver stolen in an armed robbery of a grocery store a month previously. Ben Wright carried a sawed-off shotgun, and the other two carried pistols. McCleskey went into the store to see how many people were present. He walked around the store looking at furniture and talking with one of the sales clerks who quickly concluded that he was not really interested in buying anything. After counting the people in the store, petitioner returned to the car and the four men planned the robbery. Executing the plan, petitioner entered the front of the store while the other three entered the rear by the loading dock. Petitioner secured the front of the store by rounding up the people and forcing them to lie face down on the floor. The others rounded up the employees in the rear and began to tie them up with tape. The manager was forced at gunpoint to turn over the store receipts, his watch, and \$5.00. Before the robbery could be completed, Officer Frank Schlatt, answering a silent alarm, pulled his patrol car up in front of the building. He entered the front door and proceeded down the center aisle until he was almost in the middle of the store. Two shots then rang out, and Officer Schlatt collapsed, shot once in the face and once in the chest. The bullet that struck Officer Schlatt in the chest ricocheted off a pocket lighter and lodged in a nearby sofa. That bullet was recovered and subsequently determined to have been fired from a .38 caliber Rossi revolver. The head wound was fatal. The robbers all fled. Several weeks later petitioner was arrested in Cobb County in connection with another armed robbery. He was turned over to the Atlanta police and gave them a statement confessing participation in the Dixie Furniture Store robbery but denying the shooting.

Although the murder weapon was never recovered, evidence was introduced at trial that petitioner had stolen a .38 caliber Rossi in an earlier armed robbery. The State also produced evidence at trial that tended to show

that the shots were fired from the front of the store and that petitioner was the only one of the four robbers in the front of the store. The State also introduced over petitioner's objections the statements petitioner had made to Atlanta police. Finally, the State produced testimony by one of the co-defendants and by an inmate at the Fulton County Jail that petitioner had admitted shooting Officer Schlatt and had even boasted of it. In his defense petitioner offered only an unsubstantiated alibi defense.

The jury convicted petitioner of malice murder and two counts of armed robbery. Under Georgia's bifurcated capital sentencing procedure, the jury then heard arguments as to the appropriate sentence. Petitioner offered no mitigating evidence. After deliberating the jury found two statutory aggravating circumstances—that the murder had been committed during the course of another capital felony, an armed robbery; and that the murder had been committed upon a peace officer engaged in the performance of his duties. The jury sentenced the petitioner to death on the murder charge and consecutive life sentences on the armed robbery charges.

## II. THE CONSTITUTIONALITY OF THE GEORGIA DEATH PENALTY.

### A. An Analytical Framework of the Law.

Petitioner contends that the Georgia death penalty statute is being applied arbitrarily and capriciously in violation of the Eighth and Fourteenth Amendments to the United States Constitution. He concedes at this level that the Eighth Amendment issue has been resolved adversely to him in this circuit. As a result, the petitioner wishes this court to hold that the application of a state death statute that permits the imposition of capital punishment to be based on factors of race of the defendant or race of the victim violates the equal protection clause of the Fourteenth Amendment.

It is clear beyond peradventure that the application of a statute, neutral on its face, unevenly applied against minorities, is a violation of the equal protection clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). The more difficult question presented is why under the facts of this case the petitioner would be denied equal protection of the law if he is sentenced to death because of the race of his victim. This quandary has led the Eighth Circuit to find that a petitioner has no standing to raise this claim as a basis for invalidating his sentence. *Britton v. Rogers*, 631 F.2d 572, 577 n. 3 (8th Cir. 1980), *cert. denied*, 451 U.S. 939, 101 S.Ct. 2021, 68 L.Ed.2d 327 (1981).

While this circuit in *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *reh'g denied*, 441 U.S. 937, 99 S.Ct. 2064, 60 L.Ed.2d 667, *application for stay denied*, 442 U.S. 1301, 99 S.Ct. 2091, 60 L.Ed.2d 649 (1979), seemed to give lip service to this same point of view by approving the proposition that a district court "must conclude that the focus of any inquiry into the application of the death penalty must necessarily be limited to the persons who receive it rather than their victims," *id.* at 614 n. 39, the court in *Spinkellink* also adopted the position that a petitioner such as McCleskey would have standing to sue in an equal protection context:

Spinkellink [petitioner] has standing to raise the equal protection issue, even though he is not a member of the class allegedly discriminated against, because such discrimination, if proven, impinges on his constitutional right under the Eighth and Fourteenth Amendments not to be subjected to cruel and unusual punishment. *See Taylor v. Louisiana, supra*, 419 U.S. [522] at 526 [95 S.Ct. 692 at 695, 42 L.Ed.2d 690].

*Id.* at 612 n. 36. This footnote in *Spinkellink* warrants close examination. In *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the Su-

preme Court held that a male had standing to challenge a state statute providing that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service. The Court in *Taylor* cited to *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), to conclude: "Taylor, in the case before us, was similarly entitled to tender and have adjudicated the claim that the exclusion of women from jury service deprived him of the kind of factfinder to which he was constitutionally entitled." *Id.* at 526, 95 S.Ct. at 696. In *Peters* the Supreme Court rejected the contention that because a petitioner is not black, he has not suffered any unconstitutional discrimination. The rejection of the argument, however, was based *not* on equal protection grounds, but upon due process grounds. *See* 407 U.S. at 496-97, 497 n. 5, 501, 504, 92 S.Ct. at 2165-66 n.5 2168, 2169; *id.* at 509, 92 S.Ct. at 2171 (Burger, C.J., dissenting).

Thus, for *Spinkellink* to articulate an equal protection standing predicate based upon Sixth Amendment and due process cases can be characterized, at best, as curious. Furthermore, not only does it appear that case law in this circuit subsequent to *Spinkellink* assumes that a contention similar to that advanced by petitioner here is cognizable under equal protection, *see, e.g., Adams v. Wainwright*, 709 F.2d 1443, 1449-50 (11th Cir.), *reh'g en banc denied*, 716 F.2d 914 (11th Cir.1983); *Smith v. Balkcom*, 671 F.2d 858 (5th Cir.1982) (Unit B); but it appears that this circuit is applying equal protection standards to Eighth Amendment challenges of the death penalty. *See, e.g., Adams v. Wainwright, supra. Accord, Harris v. Pulley*, 692 F.2d 1189, 1197-98 (9th Cir. 1982), *reversed and remanded on other grounds, — U.S. —*, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Indeed, in *Spinkellink* itself, the court adopted an analytical nexus between a cruel and unusual punishment contention and a Fourteenth Amendment equal protection evidentiary showing:



[T]his is not to say that federal courts should never concern themselves on federal habeas corpus review with whether Section 921.141 [Florida's death penalty statute] is being applied in a racially discriminatory fashion. If a petitioner can show some specific act or acts evidencing intentional or purposeful racial discrimination against him, see *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 [97 S.Ct. 555, 50 L.Ed.2d 450] (1977), either because of his own race or the race of his victim, the federal district court should intervene and review substantively the sentencing decision.

*Spinkellink*, 578 F.2d at 614 n. 40.

Principles of *stare decisis*, of course, mandate the conclusion that petitioner has standing to bring forth his claim. Furthermore, under *stare decisis*, this court must strictly follow the strictures of *Spinkellink* and its progeny as to standards of an evidentiary showing required by this petitioner to advance successfully his claim.

Were this court writing on a clean slate, it would hold that McCleskey would have standing under the due process clause of the Fourteenth Amendment, but not under the equal protection clause or the Eighth Amendment, to challenge his conviction and sentenced if he could show that they were imposed on him on account of the race of his victim. From a study of equal protection jurisprudence; it becomes apparent that the norms that underlie equal protection involve two values: (i) the right to equal treatment is inherently good; and (ii) the right to treatment as an equal is inherently good. See L. Tribe, *American Constitutional Law*, § 16-1, at 992-93 (1978). In this case, however, the evidence shows that the petitioner is being treated as any member of the majority would, or that petitioner's immutable characteristics have no bearing on his being treated differently from any member of the majority. Thus, with reference to his argu-



ment that he is being discriminated against on the basis of the race of his victim, equal protection interests are not being implicated.

Petitioner also fails to state a claim under the Eighth Amendment. It is clear from the decisions of the Supreme Court that the death penalty is not *per se* cruel and unusual in violation of the Eighth Amendment. Prior to *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the cruel and unusual punishments clause was interpreted as applicable to contentions that a punishment involved unnecessary pain and suffering, that it was so unique as not to serve a humane purpose, or so excessive as not to serve a valid legislative purpose. See *Furman*, 408 U.S. at 330-33, 92 S.Ct. at 2772-74 (Marshall, J., concurring). In other words, Eighth Amendment jurisprudence prior to *Furman* entailed an inquiry into the nexus between the offense and punishment; that punishment which was found to be excessive was deemed to violate Eighth Amendment concerns. The Supreme Court has determined as a matter of law that where certain aggravating features are present the infliction of the death penalty is not violative of the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In the instant case, petitioner's race of the victim argument does not address traditional Eighth Amendment concerns. His argument does not entail—nor could he seriously advance—any contention that his penalty is disproportionate to his offense, that his penalty constitutes cruel and unusual punishment, or that his penalty fails to serve any valid legislative interest.

What petitioner does contend is that the Georgia system allows for an impermissible value judgment by the actors within the system—that white life is more valuable than black life—and, as a practical matter, that the Georgia system allows for a double standard for sentencing. Certainly, such allegations raise life and liberty interests of the petitioner. Furthermore, such allegations speak not to the rationality of the process but to the val-

ues inherent in the process. In other words, it is the integrity, propriety, or "fairness" of the process that is being questioned by petitioner's contention, and not the mechanics or structure of the process. Thus, petitioner's allegation of an impermissible process speaks most fundamentally to Fourteenth Amendment due process interests, rather than Eighth Amendment interests that traditionally dealt with "cruel and unusual" contexts.

For all its consequences, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 [81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230]. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

*Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 2158-2159, 68 L.Ed.2d 640 (1981). It is clear that due process of law within the meaning of the Fourteenth Amendment mandates that the laws operate on all alike such that an individual is not subject to an arbitrary exercise of governmental power. See, e.g., *Leeper v. Texas*, 139 U.S. 462, 467-68, 11 S.Ct. 577, 579-80, 35 L.Ed. 225 (1891); *Hurtado v. California*, 110 U.S. 516, 535-36, 4 S.Ct. 111, 120-21, 28 L.Ed. 232 (1884). As Justice Frankfurter observed in *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (footnote omitted):

Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an ex-

ercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Malinski v. New York*, *supra*, [324 U.S. 401] at 416-17 [65 S.Ct. 781 at 789, 89 L.Ed. 1029]. The standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 [54 S.Ct. 330, 332, 78 L.Ed. 674], or are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 [58 S.Ct. 149, 152, 82 L.Ed. 288].

See also *Peters v. Kiff*, 407 U.S. 493, 501, 92 S.Ct. 2163, 2168, 33 L.Ed. 83 (1972) ("A fair trial in a fair tribunal is a basic requirement of due process.") (citing *In Re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955)). See generally, L. Tribe, *supra*, § 10-7, at 501-06.

In summary, the court concludes that the petitioner's allegation with respect to race of the victim more properly states a claim under the due process clause of the Fourteenth Amendment. The allegation is that the death penalty was imposed for a reason beyond that consented to by the governed and because of a value judgment which, though rational, is morally impermissible in our society. As such, McCleskey could fairly claim that he was being denied his life without due process of law. Although he couches his claims in terms of "arbitrary and capricious," he is, to the contrary, contending not that the death penalty was imposed in his case arbitrarily or capriciously

but on account of an intentional application of an impermissible criterion. As the Supreme Court predicted in *Gregg* and as petitioner's evidence shows, the Georgia death penalty system is far from arbitrary or capricious.

This court is not, however, writing on a clean slate. Instead, it is obliged to follow the interpretations of its circuit on such claims. As noted earlier *Yick Wo* gives McCleskey standing to attack his sentence on the basis that it was imposed on him because of his race and *Spinkellink* gives him standing under the equal protection clause to attack his sentence because it was imposed because of the race of his victim. McCleskey is entitled to the grant of a writ of habeas corpus if he establishes that he was singled out for the imposition of the death penalty by some specific act or acts evidencing an intent to discriminate against him on account of his race or the race of his victim. *Smith v. Balkcom*, 660 F.2d 573 (5th Cir. Unit B 1981), *modified in part*, 671 F.2d 858 (1982); *Spinkellink, supra*. In *Stephens v. Kemp*, — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370 (1983), Justice Powell, in a dissent joined in by the Chief Justice and Justices Rehnquist and O'Connor, made the following statement with reference to the Baldus study:

Although characterized by the judges of the court of appeals who dissented from the denial of the hearing en banc as a "particularized statistical study" claimed to show "intentional race discrimination," no one has suggested that the study focused on this case. A "particularized" showing would require—as I understand it—that there was intentional race discrimination in indicting, trying and convicting Stephens and presumably in the state appellate and state collateral review that several times follows the trial.

*Id.* 104 S.Ct. at 564 n. 2 (Powell, J. dissenting).

The intentional discrimination which the law requires cannot generally be shown by statistics alone.

*Spencer v. Zant*, 715 F.2d 1562, 1581 (11th Cir.1983), *reh'g en banc granted*, 715 F.2d 1583 (11th Cir.1983). Disparate impact alone is insufficient to establish a violation of the Fourteenth Amendment unless the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination. *Sullivan v. Wainwright*, 721 F.2d 316 (11th Cir.1983); *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir.1983); *Smith v. Balkcom*, 671 F.2d 858, 859 (5th Cir. Unit B), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982).

B. An Analytical Framework of Petitioner's Statistical Evidence.

The petitioner does rely upon statistical evidence to support his contentions respecting the operation of racial discrimination on a statewide basis. He relies on statistical and anecdotal evidence to support his contentions that racial factors play a part in the application of the death penalty in Fulton County where he was sentenced.

Statistical evidence, of course, is nothing but a form of circumstantial evidence. Furthermore, it is said "that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Teamsters v. United States*, 431 U.S. 324, 340, 97 S.Ct. 1843, 1857, 52 L.Ed.2d 396 (1977).

As courts have dealt with statistics in greater frequency, a body of common law has developed a set of statistical conventions which must be honored before statistics will be admitted into evidence at all or before they are given much weight. These common law statistical conventions prevail even over the conventions generally accepted in the growing community of econometricians. The first convention which has universally been honored in death penalty cases is that any statistical analysis



must reasonably account for racially neutral variables which could have produced the effect observed. See *Smith v. Balkcom*, *supra*; *Spinkellink v. Wainwright*, 578 F.2d 582, 612-16 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); *McCorquodale v. Balkcom*, 705 F.2d 1553, 1556 (11th Cir.1983).

The second convention which applies in challenges brought under the equal protection clause is that the statistical evidence must show the likelihood of discriminatory treatment by the decision-makers who made the judgments in question. *Adams v. Wainwright*, *supra*; *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir.1968) (Blackmun, J.), *vacated on other grounds*, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970).

The third general statistical convention is that the underlying data must be shown to be accurate. The fourth is that the results should be statistically significant. Generally, a statistical showing is considered significant if its "P" value is .05 or less, indicating that the probability that the result could have occurred by chance is 1 in 20 or less. Said another way, the observed outcome should exceed the standard error estimate by a factor of 2. *Eastland v. TVA*, 704 F.2d 613, 622 n. 12 (11th Cir.1983).

McCleskey relies primarily on a statistical technique known as multiple regression analysis to produce the statistical evidence offered in support of his contentions. This technique is relatively new to the law. This court has been able to locate only six appellate decisions where a party to the litigation relied upon multiple regression analysis. In two of them, the party relying on the analysis prevailed, but in both cases their showings were supported by substantial anecdotal evidence. *E.g.*, *Wade v. Mississippi Cooperative Extension Service*, 528 F.2d 508 (5th Cir.1976). In four of them, the party relying upon the technique was found to have failed in his attempt to prove something through a reliance on it. Generally, the failure came when the party relying upon

multiple regression analysis failed to honor conventions which the courts insisted upon. Before a court will find that something is established based on multiple regression analysis, it must first be shown that the model includes all of the major variables likely to have an effect on the dependent variable. Second, it must be shown that the unaccounted-for effects are randomly distributed throughout the universe and are not correlated with the independent variables included. *Eastland, supra*, at 704.

In multiple regression analysis one builds a theoretical statistical model of reality and then attempts to control for all possible independent variables while measuring the effect of the variable of interest upon the dependent variable. Thus, a properly done study begins with a decent theoretical idea of what variables are likely to be important. Said another way, the model must be built by someone who has some idea of how the decision-making process under challenge functions. Three kinds of evidence may be introduced to validate a regression model: (1) Direct testimony as to what factors are considered, (2) what kinds of factors generally operate in a decision-making process like that under challenge, and (3) expert testimony concerning what factors can be expected to influence the process under challenge. *Eastland, supra*, at 623 (quoting Baldus and Cole, *Statistical Proof of Discrimination*).

Other cases have established other conventions for the use of multiple regression analysis. It will be rejected as a tool if it does not show the effect on people similarly situated; across-the-board disparities prove nothing. *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 656-58 (4th Cir. 1983), *appeal pending*; *Valentino v. U.S. Postal Service*, 674 F.2d 56, 70 (D.C. Cir.1982). A regression model that ignores information central to understanding the causal relationships at issue is insufficient to raise an inference of discrimination. *Valentino, supra*, at 71. Finally, the validity of the model depends upon a showing that it predicts the varia-

tions in the dependent variable to some substantial degree. A model which explains only 52 or 53% of the variation is not very reliable. *Wilkins v. University of Houston*, 654 F.2d 388, 405 (5th Cir.1981), *cert. denied*, 459 U.S. 822, 103 S.Ct. 51, 74 L.Ed.2d 57 (1982).

"To sum up, statistical evidence is circumstantial in character and its acceptability depends upon the magnitude of the disparity it reflects, the relevance of its supporting data, and other circumstances in the case supportive of or in rebuttal of a hypothesis of discrimination." *EEOC v. Federal Reserve Bank of Richmond, supra*, at 646-47. Where a gross statistical disparity can be shown, that alone may constitute a *prima facie* case of discrimination. This has become the analytical framework in cases brought under Title VII of the Civil Rights Act of 1964. Because Fourteenth Amendment cases have a similar framework and because there are relatively few such cases relying on statistics, when appropriate the court may draw upon Title VII cases. *Jean v. Nelson*, 711 F.2d 1455, 1486 n. 30 (11th Cir.), *reh'g en banc granted*, 714 F.2d 96 (1983).

Generally it is said that once the plaintiff has put on a *prima facie* statistical case, the burden shifts to the defendant to go forward with evidence showing either the existence of a legitimate non-discriminatory explanation for its actions or that the plaintiff's statistical proof is unacceptable. *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir.1980), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). The statistics relied upon by the plaintiff to establish a *prima facie* case can form the basis of the defendant's rebuttal case when, for example, the defendant shows that the numerical analysis is not the product of good statistical methodology. *EEOC v. Datapoint Corp.*, 570 F.2d 1264 (5th Cir.1978). Said another way, a *prima facie* case is not established until the plaintiff has demonstrated both that the data base is sufficiently accurate and that the regression model has been properly constructed. Otherwise, the evidence would

be insufficient to survive a motion for directed verdict, and this is the *sine qua non* of a prima facie case. *Jean, supra*, at 1487. Statistics produced on a weak theoretical foundation are insufficient to establish a prima facie case. *Eastland, supra*, at 625.

Once a prima facie case is established the burden of production is shifted to the respondent. If it has not already become apparent from the plaintiff's presentation, it then becomes the defendant's burden to demonstrate that the plaintiff's statistics are misleading, and such rebuttal may not be made by speculative theories. See *Eastland, supra*, at 618; *Coble v. Hot Springs School District*, 682 F.2d 721, 730-31 (8th Cir.1982); *Jean v. Nelson, supra*.

### C. Findings of Fact.

The court held an evidentiary hearing for the purpose of enabling the petitioner to put on the evidence he had in support of his contention that racial factors are a consideration in the imposition of the death penalty.<sup>1</sup> Hereafter are the court's findings as to what was established within the context of the legal framework set out above.

#### 1. *The Witnesses*

The principal witness called by the petitioner was Professor David C. Baldus. Professor Baldus is a 48-year-old Professor of Law at the University of Iowa. Presently he is on leave from that post and is serving on the faculty of the University of Syracuse. Baldus's principal expertise is in the use of statistical evidence in law. He and a statistician, James Cole, authored a book entitled *Statistical Proof of Discrimination* that was published by

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<sup>1</sup> A separate one-day hearing was had several months after the original hearing. The transcript of those proceedings appears in Volume X of the transcript, and that testimony will hereafter be referred to with the prefix "X."



McGraw-Hill in 1980. R 54-56. He has done several pieces of social science research involving legal issues and statistical proof. R 45-46, 53.

Before he became involved in projects akin to that under analysis here, Baldus apparently had had little contact with the criminal justice system. In law school he took one course which focused heavily on the rationale of the law of homicide. R 39. During his short stint in private practice he handled some habeas corpus matters and had discussions with a friend who was an Assistant District Attorney concerning the kinds of factors which his friend utilized in deciding how to dispose of cases. R 43-44. As a part of the preparation of statistical proof of discrimination, Baldus and his co-author, Cole, re-evaluated the data set relied upon in *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir.1968), *vacated on other grounds*, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970), a rape case. R 72.

Baldus became interested in methods of proportionality review and, together with four other scholars, published findings in the *Stanford Law Review* and the *Journal of Criminal Law and Criminology*. R 89. This was done on the basis of an analysis of some capital punishment data from California. R 81, *et seq.* Thereafter Baldus became a consultant to the National Center for State Courts and to the Supreme Court of South Dakota and the Supreme Court of Delaware. It is understood that his consulting work involved proportionality review. R 95. Baldus and Cole have also prepared an article for the *Yale Law Journal* evaluating statistical studies of the death penalty to determine if it had a deterrent effect. R 78. At the University of Iowa Baldus taught courses on scientific evidence, discrimination law, and capital punishment.

Baldus was qualified by the court as an expert on the legal and social interpretation of data, not on the issue of whether or not the statistical procedures were valid under the circumstances. While Baldus has some familiarity with statistical methodology, he was quick to defer to



statistical experts where sophisticated questions of methodology were posed. *See generally* R 109-20.

Dr. George Woodworth was called by the petitioner and qualified as an expert in the theory and application of statistics and statistical computation, especially with reference to analysis of discreet outcome data. Dr. Woodworth is an Associate Professor of Statistics at the University of Iowa and collaborated with Baldus on the preparation of the study before the court. R 1193.

The petitioner also called Dr. Richard A. Berk, a Professor of Sociology at the University of California at Santa Barbara, and he was qualified as an expert in social science research with particular emphasis on the criminal justice system. R 1749-53.

The respondents called two experts. One was Dr. Joseph Katz, an Assistant Professor at Georgia State University in the Department of Quantitative Methods. He was qualified as an expert in analyzing data, in research design, in statistics, statistical analysis and quantitative methods. R 1346. Dr. Katz is a rather recent graduate of Louisiana State University. The respondent also called Roger L. Burford, a Professor of Quantitative Business Analysis at LSU. He was Katz's mentor at the graduate level. Burford was qualified as a statistical expert. R 1627-32.

*The court was impressed with the learning of all of the experts. Each preferred the findings and assumptions which supported his thesis, but it seemed to the court that no one of them was willing to disregard academic honesty to the extent of advancing a proposition for which there was absolutely no support.*

## 2. Scope of the Studies

Baldus and Woodworth conducted two studies on the criminal justice system in Georgia as it deals with homicide and murder cases. The first is referred to as the Procedural Reform Study. The second is referred to as the Charging and Sentencing Study. R 121-122.

The universe for the Procedural Reform Study included all persons convicted of murder at a guilt trial. Also included were several offenders who pled guilty to murder and received the death penalty. The time period for the study included offenders who were convicted under the new Georgia death penalty statute which went into effect on March 28, 1973, and included all such offenders who had been arrested as of June 30, 1978. In the Procedural Reform Study no sample of the cases was taken and instead the entire universe was studied. R 170-71. The data sources used by the researchers in the Procedural Reform Study were the files of the Georgia Supreme Court, certain information from the Department of Offender Rehabilitation, and information from the Georgia Department of Vital Statistics. R 175, *et seq.* Except for the few pleas, the Procedural Reform Study focused only on offenders who had been convicted of murder at a trial. R 122. There was approximately 550 cases in the universe for the Procedural Reform Study.

The Procedural Reform Study began when Baldus developed a questionnaire and dispatched two students to Georgia in the fall of 1979. In 1980 the coders returned to Georgia and coded 264 cases on site. R 241-43, DB 28, DB 28A. As two different questionnaires were used, the researchers wrote a computer program which translated the data gathered from both questionnaires into one format. R 246.

Baldus made some preliminary studies on the data that he gathered in the Procedural Reform Study. He found in these preliminary analyses no "race of the defendant" effect and a very unclear "race of the victim" effect. R 258. The Legal Defense Fund learned of Baldus's research and retained him to conduct the second study. R 256. Baldus was of the opinion that it was critical to the validity of the study that the strength of the evidence be measured. R 262. Also, he felt it important to examine the combined effects of all the decisions made at the different levels of the criminal justice system. R 147. Ac-

cordingly, the design of the Charging and Sentencing Study was different in that it produced measurements in these two respects in addition to measuring factors akin to those which were already being taken into account in the Procedural Reform Study.

The universe for the Charging and Sentencing Study was all offenders who were convicted of murder or voluntary manslaughter whose crimes occurred after March 28, 1973 and whose arrests occurred before December 21, 1978. This produced a universe of about 2500 defendants. R 123, 263-64. Any defendant who was acquitted or convicted of a lesser-included offense is not included in the study. R 264.

From the universe of the Charging and Sentencing Study a random stratified sample was drawn. The first stratification was by outcome. The researchers drew a 25% random sample of murder cases with life sentences and a 25% random sample of voluntary manslaughter cases. R 1216. To this sample, all death penalty cases were added. R 267-69. The second stratification was geographic. The researchers drew a sample of 18 cases from each judicial circuit in Georgia. Where the circuit did not produce 18 cases in the first draw, additional cases were drawn from the population to supplement the original random sample. The results from each judicial circuit were then weighted so that each circuit contributed to the total effect in proportion to the total number of cases it contributed to the universe. R 270.

*Because of the many factors involved in such an analysis, a simple binomial comparison would show nothing. To determine whether or not race was being considered, it is necessary to compare very similar cases. This suggests the use of a statistical technique known as cross tabulation. Because of the data available, it was impossible to get any statistically significant results in comparing exact cases using a cross tabulation method. R 705. Accordingly, the study principally relies upon multivariate analysis.*

### 3. *The Accuracy of the Data Base*

As will be noted hereafter, no statistical analysis, much less a multivariate analysis, is any better than the accuracy of the data base. That accuracy was the subject of much testimony during the hearing. To understand the issue it is necessary to examine the nature of the questionnaires utilized and the procedures employed to enter the data upon the questionnaires.

The original questionnaire for the Procedural Reform Study was approximately 120 pages long and had foils (blanks) for the entry of data on about 500 variables. DB 27. The first 14 pages of the questionnaire were filled out by the Georgia Department of Offender Rehabilitation for Professor Baldus. The remainder of the pages were coded by students in Iowa based on extracts prepared by data gatherers in Georgia.

The data on the first 15 pages of the Procedural Reform Study questionnaire includes information on sentencing, basic demographic data concerning the defendant, his physical and psychiatric condition, his IQ, his prior record, as well as information concerning his behavior as an inmate. The next six pages of the questionnaire contained inquiries concerning the method of killing. Data is also gathered on the number of victims killed, information about co-perpetrators, and the disposition of their cases, and pleadings by the defendant. Another eight pages of questions search out characteristics of the offense. Three pages are reserved for data on contemporaneous offenses, and another three pages for the victim's role in the crime and the defendant's behavior after the homicide. There are additional pages on the role of co-perpetrators. There are more questions relating to the defense at trial and on the kinds of evidence submitted by the defendant. Then, there are 26 pages of questions concerning the deliberations of the jury and information concerning the penalty trial. The questionnaire concludes on matters relating to the disposition of the case with



respect to other counts charged and, finally, the last page is reserved for the coder to provide a narrative summary of what occurred in the case. R 197-200, DB 27. This questionnaire also contained foils so that the coder could indicate whether or not the prosecutor or the jury was aware of the information being coded.

It is important to reiterate that this questionnaire was not coded by students having access to the raw data in Georgia. Instead, as noted above, two law students prepared detailed abstracts of each case. Their notes were dictated and transcribed. These notes, together with an abstract filled out by an administrative aide to the Georgia Supreme Court and the opinion of the Georgia Supreme Court, were assembled as a file and were available in Iowa to the coders. R 209, 212, 241.

During the 1979-80 academic year, another questionnaire, simpler in form, was designed for use in obtaining data for the Procedural Reform Study. This questionnaire dropped the inquiries concerning whether the sentencing jury was aware of the aggravating and mitigating factors appearing in the files. R. 230-31. Some of the questionnaires were coded in Georgia and some were coded in Iowa. Baldus developed a coding protocol in an effort to guide those who were entering data on the questionnaires. R 220-21, 227. The professional staff at the University of Iowa Computer Center entered the data obtained from the various Procedural Reform Study questionnaires into the computer.

Yet another questionnaire was designed for the Charging and Sentencing Study. The last questionnaire was modified in three respects. First, Baldus included additional queries concerning legitimate aggravating and mitigating factors because he had determined on the basis of his experience with earlier data that it was necessary to do so. Second, the questionnaire expanded the coverage of materials relating to prior record. Third, it contained a significant section on "strength of the evidence." R 274-77. After the new draft was produced and re-



viewed by several other academicians, it was reviewed by attorneys with the Legal Defense Fund. They suggested the addition of at least one other variable. R 275.

The Charging and Sentencing Study questionnaire is 42 pages long and has 595 foils for the recordation of factors which might, in Baldus's opinion, affect the outcome of the case. Generally, the kind of information sought included the location of the offense, the details of all of the charges brought against the offender, the outcome of the case, whether or not there was a plea bargain, characteristics of the defendant, prior record of the defendant, information regarding contemporaneous offenses, details concerning every victim in the case, characteristics of the offense, statutory aggravating factors, a delineation of the defendant's role vis-a-vis co-perpetrators', information on outcome of co-perpetrators' cases, other aggravating circumstances such as the number of shots fired, miscellaneous mitigating circumstances relating to the defendant or the victim, the defendant's defenses at the guilt trial, and the strength of the evidence. R 280-86. Again, all of these were categories of information which Baldus believed could affect the outcome of a given case.

A student who headed a portion of the data-gathering effort for the first study was placed in charge of five law students who were hired and trained to code the new questionnaires. R 308. This supervisor's name was Ed Gates.

The principal data source for the Charging and Sentencing study was records of the Georgia Department of Pardons and Paroles. This was supplemented with information from the Bureau of Vital Statistics and questionnaires returned from lawyers and prosecutors. Also, some information was taken from the Department of Offender Rehabilitation. R 293-94, DB 39. The records from the Department of Pardons and Paroles included a summary of the police investigative report prepared by a parole officer, an FBI rap sheet, a personal history evaluation, an admissions data summary sheet, and, on occa-

sion, the file might contain a witness statement or the actual police report. R 347. The police report actually appeared in about 25% of the cases. R 348. The Pardons and Paroles Board investigative summaries were always done after conviction.

Baldus and Gates again developed a written protocol in an attempt to assist coders in resolving ambiguities. This protocol was developed in part on past experience and in part on a case-by-case basis. R 239, 311. In the Charging and Sentencing Study the coders were given two general rules to resolve ambiguities of fact. The first rule was that the ambiguity ought to be resolved in a direction that supports the determination of the factfinder. The second rule is that when the record concerning a fact is ambiguous the interpretation should support the legitimacy of the sentence. R 423, EG 4.

As to each foil the coder had four choices. The response could be coded as 1, showing that the factor was definitely present, or 2, which means that the file indicated the presence of the factor. If the factor was definitely not present, the foil was left blank. In cases where it was considered equally possible for the factor to be absent or present, the coder entered the letter "U." R 517. For the purpose of making these coding decisions, it was assumed that if the file indicated that a witness who would likely have seen the information was present or if, in the case of physical evidence, it was of the type that the police would likely have been able to view, and if such information did not appear in the Parole Board summaries, then the coder treated that factor as not being present. R 521.

In addition to coding questionnaires the coders were asked to prepare brief summaries that were intended to highlight parts of the crime that were difficult to code. R 366.

By the end of the summer of 1981 the questionnaires had been coded in Georgia and they were returned to Iowa. R 585. All of the data collected had to be entered onto a magnetic tape, and this process was completed by

the Laboratory for Political Research at the University of Iowa. R 595. That laboratory "cleaned" the data as it was key punched; that is, where an impermissible code showed up in a questionnaire it was reviewed by a student coder who re-coded the questionnaire based upon a reading of Baldus's file. R 600-08.

After the data gathered for the Charging and Sentencing Study was entered on computer tapes, it was re-coded so that the data would be in a useful format for the planned analysis. The first step of the re-coding of the data was to change all 1 and 2 codes to 1, indicating that the factor was positively present. The procedure then re-coded all other responses as 0, meaning that the characteristic was not present. R 617-20.

It appears to the court that the researchers attempted to be careful in that data-gathering, but, as will be pointed out hereafter, the final data base was far from perfect. An important limitation placed on the data base was the fact that the questionnaire could not capture every nuance of every case. R 239.

Because of design of earlier questionnaires, the coders were limited to only three special precipitating events. There were other questions where there were limitations upon responses, and so the full degree of the aggravating or mitigating nature of the circumstances were not captured. In these situations where there was only a limited number of foils, the responses were coded in the order in which the student discovered them, and, as a consequence, those entered were not necessarily the most important items found with respect to the variable. R 545. The presence or absence of enumerated factors were noted without making any judgment as to whether the factor was indeed mitigating or aggravating in the context of the case. R 384.

In the Charging and Sentencing Study as well, there were instances where there was a limit on the number of applicable responses which could be entered. For example, on the variable "Method of Killing," only three foils

were provided. R 461, EG 6A, p. 14. The effect of this would be to reduce the aggravation of a case that had multiple methods of inflicting death. In coding this variable the students generally would list the method that actually caused the death and would not list any other contributing assaultive behavior. R 463.

The information available to the coders from the Parole Board files was very summary in many respects. For example, on one of the completed questionnaires the coder had information that the defendant had told four other people about the murder. The coder could not, however, determine from the information in the file whether the defendant was bragging about the murder or expressing remorse. R 467-68. As the witnesses to his statements were available to the prosecution and, presumably, to the jury, that information was knowable and probably known. It was not, however, captured in the study. The Parole Board summaries themselves were brief and the police reports from which the parole officers prepared their reports were typically only two or three pages long. R 1343.

Because of the incompleteness of the Parole Board studies, the Charging and Sentencing Study contains no information about what a prosecutor felt about the credibility of any witnesses. R 1117. It was occasionally difficult to determine whether or not a co-perpetrator testified in the case. One of the important strength of the evidence variables coded was whether or not the police report indicated clear guilt. As the police reports were missing in 75% of the cases, the coders treated the Parole Board summary as a police report. R 493-94. Then, the coders were able to obtain information based only upon their impressions of the information contained in the file. R 349.

Some of the questionnaires were clearly mis-coded. Because of the degree of latitude allowed the coders in drawing inferences based on the data of the file, a recoding of the same case by the same coder at a time subsequent might produce a different coding. R 370, 386-87. Also,



there would be differences in judgment among the coders. R 387.

Several questionnaires, including the one for McCleskey and for one of his co-perpetrators, was reviewed at length during the hearing. There were inconsistencies in the way several variables were coded for McCleskey and his co-perpetrator. R 1113; Res. 1, Res. 2.

The same difficulties with accuracy and consistency of coding appeared in the Charging and Sentencing questionnaires. For example, the Charging and Sentencing Study had a question as to whether or not the defendant actively resisted or avoided arrest. McCleskey's questionnaire for the Charging and Sentencing Study indicated that he did not actively resist or avoid arrest. His questionnaire for the Procedural Reform Study indicated that he did. R 1129-30; Res. 2, Res. 4. Further, as noted above in one situation where it was undoubtedly knowable as to whether or not the defendant expressed remorse or bragged about the homicide, the factor was coded as "U." Under the protocol referred to earlier, if there was a witness present who could have known the answer and the answer did not appear in the file, then the foil is to be left blank. This indicates that the questionnaire, EG 6B, was not coded according to the protocol at foils 183 and 184.

To test the consistency of coding judgments made by the students, Katz tested the consistency of coding of the same factor in the same case as between the two studies as to 30 or so variables. There were 361 cases which appeared in both studies. Of the variables that Katz selected there were mis-matches in coding in all but two of the variables. Some of the mis-matches were significant and occurred within factors which are generally thought to be important in a determination of sentencing outcome. For example, there were mis-matches in 50% of the cases tested as to the number of death eligible factors occurring in the case. Other important factors and the percent of mis-matches are as follows:



Number of prior felonies	33%
Immediate Rage Motive	15%
Execution Style Murder	18%
Unnecessary Killing	18%
Defendant Additional Crimes	16%
Bloody	28%
Defendant Drug History	25%
Victim Aroused Fear in the Defendant	16%
Two or More Victims in All	80%
Victim is a Stranger	12%

Respondent's Exhibit 20A, R 1440, *et seq.*

A problem alluded to above is the way the researchers chose to deal with those variables coded "U." It will be recalled that for a variable to be coded "U" in a given questionnaire, there must be sufficient circumstances in the file to suggest the possibility that it is present and to preclude the possibility that it is not present. In the Charging and Sentencing Study there are an average of 33 variables in each questionnaire which are coded as "U." The researchers treated that information as not known to the decision-maker. R 1155. Under the protocol employed, the decision to treat the "U" factors as not being present in a given case seems highly questionable. The threshold criteria for assuming that a factor was not present were extremely low. A matter would not have been coded "U" unless there was something in the file which made the coder believe that the factor could be present. Accordingly, if the researchers wished to preserve the data and not drop the cases containing this unknown information, then it would seem that the more rational decision would be to treat the "U" factors as being present.

This coding decision pervades the data base. Well more than 100 variables had some significant number of entries coded "U." Those variables coded "U" in more than ten percent of the questionnaires are as follows (the sample size in the Charging and Sentencing Study is 1,084) :

Plea Bargaining	445
Employment Status of the Defendant	107
Victim's Age	189
Occupational Status of the Victim	721
Employment Status of the Victim	744
Defendant's Motion was Long-Term Hate	284
Defendant's Motive was Revenge	202
Defendant's Motive was Jealousy	130
Defendant's Motive was Immediate Rage	181
Defendant's Motive was Racial Animosity	447
Dispute While under the Influence of Alcohol or Drugs	159
Victim Mental Defective	625
Victim Pregnant	239
Victim Defenseless due to Disparity in Size or Numbers	134
Victim Support Children	781
Victim Offered No Provocation	192
Homicide Planned for More than Five Minutes	496
Execution-Style Homicide	109
Victim Pleaded for Life	799
Defendant Showed No Remorse for Homicide	902
Defendant Expressed Pleasure With Homicide	885
Defendant Created Risk of Death to Others	128
Defendant Used Alcohol or Drugs Before the Crime	251
Effect of Alcohol on the Defendant	220
Defendant Showed Remorse	913
Defendant Surrendered within 24 Hours	125
Victim Used Drugs or Alcohol Before Homicide	244
Effect of Drugs on Victim	168
Victim Aroused Defendant's Fear for Life	220
Victim Armed with Deadly Weapon	155
History of Bad Blood Between Defendant and Victim	173
Victim Accused Defendant of Misconduct	117
Victim Physically Assaulted Defendant at Homicide	159
Victim Verbally Threatened Defendant at Homicide	185

Victim Verbally Abused Defendant at Homicide	300
Victim Verbally Threatened Defendant Earlier	100
Victim Verbally Abused Defendant Earlier	156
Victim Had Bad Criminal Reputation	665
Victim had Criminal Record	946

A large number of other variables were coded "U" in more than five percent of the questionnaires. Race of the victim was unknown in 62 cases. Other variables which are often thought to explain sentencing outcomes and which were coded "U" in more than five percent of the questionnaires included:

Defendant's Motive was Sex	68
Defendant's Motive Silence Witness for Current Crime	72
Dispute with Victim/Defendant over Money/Property	76
Lovers' Triangle	74
Victim Defenseless due to Old Age	63
Defendant Actively Resisted Arrest	67
Number of Victims Killed by the Defendant	66
Defendant Cooperated with Authorities	72
Defendant had History of Drug and Alcohol Abuse	79
Victim Physically Injured Defendant at Homicide	63
Victim Physically Assaulted Defendant Earlier	71

Many of the variables showing high rates of "U" codings were used in Baldus's models. For example, in Exhibit DB 83, models controlling for 13, 14 and 44 variables, respectively, are used in an effort to measure racial disparities. In the 13-variable model, five of the variables have substantial numbers of "U" codes. In the 14-variable model, seven variables are likewise affected, and in the 44-variable model, six were affected. Similar problems plagued the Procedural Reform Study. Respondent's Exhibits 17A, 18A; DB 96A, DB 83, R 1429.

Because of the substantial number of "U" codes in the data base and the decision to treat that factor as not

present in the case, Woodworth re-coded the "U" data so that the coding would support the outcome of the case and ran a worst case analysis on five small models. This had the effect generally of depressing the coefficients of racial disparity by as much as 25%. In the three models which controlled for a relatively small number of background variables, he also re-computed the standard deviation based on his worst case analysis. In the two larger models on which he ran these studies, he did not compute the standard deviation, and in the largest model he did not even compute the racial coefficients after conducting the worst case analysis. Accordingly, it is impossible for the court to determine if the coefficient for race of the victim remains present or is statistically significant in these larger order regressions. Both because of this and because the models used in the validating procedure were not themselves validated, it cannot be said that the coding decision on the "U" data made no effect on the results obtained. See generally GW 4, Table 1.

In DB 122 and 123 Baldus conducts a worst case analysis which shows the results upon re-coding "U" data so as to legitimize the sentence. Baldus testified that the coding of unknowns would not affect the outcome of his analysis based on the experiments and these exhibits. The experiments do not, however, support his conclusions, and it would appear to the court that the experiments were not designed to support his conclusions. In DB 122 Baldus controls for only three variables; thence, it is impossible to measure the effect of any other variables or the effects that the re-coding would have on the outcome. In DB 123 he utilizes a 39-variable model and concludes that on the basis of the re-coding it has no effect on the racial coefficients. Only five of the variables in the 39-variable model have any substantial coding problems associated with them. (For these purposes the court is defining a "substantial problem," as a variable with more than 100 entries coded "U.") These five variables are the presence of a statutory aggravating factor B3 and

B7D, hate, jealousy, and a composite of family, lover, liquor, or barroom quarrel. Baldus did not test any of his larger regressions to see what the effect would be. R 1701, *et seq.*, DB 96A, Schedule 4, DB 122, DB 123, Res. Exh. 47A.

In addition to the questionable handling of the "U" codes, there were other factors which might affect the outcome of the study where information was simply unknown or unused. In the Charging and Sentencing Study data related with the response "Other" was not used in subsequent analyses. In one factor, "special aggravating feature of the offense," there were 139 "Other" responses. R 1392, 1437.

Cases where the race of the victim was unknown were coded on the principle of imputation, as though the race of the victim was the same as the race of the defendant. R 1096.

There were 23 or 24 cases in the Procedural Reform Study and 62 or 63 cases in the Charging and Sentencing Study where the researchers did not know whether or not a penalty trial had been held. R 1522. Baldus, on the basis of the rate at which penalty trials were occurring in his other cases, predicted what proportion of these that probably proceeded to a penalty trial. The criteria for deciding precisely which of these cases proceeded to a penalty trial and which did not is unknown to the court. R 1101. It is not beyond possibility that the treatment of these 62 cases could have skewed the results. The data becomes important in modeling the prosecutorial decisions to seek a death sentence after there had been a conviction. Based on his sample Baldus projects that something over 760 murder convictions occurred. If the 62 cases were proportionally weighted by a factor of 2.3 (2484 cases in the universe divided by 1084 cases in the sample equals 2.3), the effect would be the same as if he were missing data on 143 cases. Said another way, he would be missing data on about 18 to 20% of all of the decisions he was seeking to study. *See generally* R 1119.



The study was also missing any information on race of the victim where there were multiple victims. R 1146-47. Further, Baldus was without information on whether or not the prosecutor offered a plea bargain in 40% of the cases. R 1152. One of the strength of the evidence questions related to whether or not there was a credibility problem with a witness. Such information was available only in a handful of files. R 532-33. Further, the data would not include anything on anyone who was convicted of murder and received probation. R 186.

Multiple regression requires complete correct data to be utilized. If the data is not correct the results can be faulty and not reliable. R 1505-06. Katz urged that the most accepted convention in dealing with unknowns is to drop the observations from the analysis. R 1501-04. Berk opined that missing data seldom makes any difference unless it is missing at the order of magnitude of 30 to 45%. R 1766. This opinion by Berk rests in part upon his understanding that the missing data, whether coded "U" or truly missing, was unknowable to the decision-maker. In the vast majority of cases this is simply not the case.

*After a consideration of the foregoing, the court is of the opinion that the data base has substantial flaws and that the petitioner has failed to establish by a preponderance of the evidence that it is essentially trustworthy.* As demonstrated above, there are errors in coding the questionnaire for the case *sub judice*. This fact alone will invalidate several important premises of petitioner's experts. Further, there are large numbers of aggravating and mitigating circumstances data about which is unknown. Also, the researchers are without knowledge concerning the decision made by prosecutors to advance cases to a penalty trial in a significant number of instances. The court's purpose here is not to reiterate the deficiencies but to mention several of its concerns. It is a major premise of a statistical case that the data base numerically mirrors reality. If it does not in substantial degree

mirror reality, any inferences empirically arrived at are untrustworthy.

#### 4. *Accuracy of the Models*

In a system where there are many factors which affect outcomes, an unadjusted binomial analysis cannot explain relationships. According to Baldus, no expert opinion of racial effects can rest upon unadjusted figures. R 731. In attempting to measure the effect of a variable of interest, Baldus testified that if a particularly important background variable is not controlled for, the coefficient for the variable of interest does not present a whole picture. Instead, one must control for the background effects of a variety of factors at once. One must, Baldus testified, identify the important factors in the system and control for them. R 694-95. Baldus also testified that a study which does not focus on individual stages in the process and does not control for very many background factors is limited in its power to support an inference of discrimination. R 146-47. Because he realized the necessity of controlling for all important background variables, he read extensively, consulted with peers, and from these efforts and from his prior analysis of data sets from California and Arkansas, he sought in his questionnaires to obtain information on every variable he believed would bear on the matter of death-worthiness of an individual defendant's case. His goal was to create a data set that would allow him to control for all of those background factors. R 194-95, 739. At this point it is important to emphasize a difference between the Procedural Reform Study and the Charging and Sentencing Study. The Procedural Reform Study contains no measures for strength of the evidence. Because Baldus was of the opinion that this could be a factor in whether or not capital punishment was imposed, information regarding the strength of the evidence was collected in the Charging and Sentencing Study. R 124, 286.

Baldus collected data on over 500 factors in each case. From the 500 variables he decided to select 230 for inclusion in further statistical analysis. R 659. He testified without further explanation that these 230 variables were the ones that he would expect to explain who received death sentences and who did not. R 661. X 631. Based on this testimony it follows that any model which does not include the 230 variables may very possibly not present a whole picture.

The 230 variable-model has several deficiencies. It assumes that all of the information available to the data-gatherers was available to each decision-maker in the system at the time that decisions were made. R 1122. This is a questionable assumption. To the extent that the records of the Parole Board accurately reflect the circumstances of each case, they present a retrospective view of the facts and circumstances. That is to say, they reflect a view of the case after all investigation is completed, after all pretrial preparation is made, after all evidentiary rulings have been handed down, after each witness has testified, and after the defendant's defense or mitigation is aired. Anyone who has ever tried a lawsuit would testify that it is seldom and rare when at progressive stages of the case he knows as much as he knows by hindsight. Further, the file does not reflect what was known to the jury but only what was known to the police. Legal literature is rife with illustrations of information known reliably to the parties which they never manage to get to the factfinders. Consequently, the court feels that any model produced from the data base available is substantially flawed because it does not measure decisions based on the knowledge available to the decision-maker.

Beyond that defect, there are other reasons to distrust the 230-variable model or any of the others proposed by Baldus. Statisticians have a method for measuring what portion of the variance in the dependent variable (here death sentencing rate) is accounted for by the independent variables included in the model. This measure is

known as an adjusted  $r^2$ . The  $r^2$  values for a model which is perfectly predictive of changes in the dependent variable would have a value of 1.0. The  $r^2$  values for the models utilized by Woodworth to check the validity of his statistical techniques range from .15 to .39. The  $r^2$  for the 230-variable model is between .46 and .48. The difference between the  $r^2$  value and 1 may be explained by one of two hypotheses. The first is that the other unaccounted-for factors at work in the system are totally random or unique features of individual cases that cannot be accounted for in any systematic way. The other theory is that the model does not model the system. R 1266-69, GW 4, Table 1. As will appear hereafter, neither Baldus nor Woodworth believes that the system is random.

In summary, the  $r^2$  measure is an indicia of how successful one has been with one's model in predicting the actual outcome of cases. R 1489. As the 230-variable model does not predict the outcome in half of the cases and none of the other models produced by the petitioner has an  $r^2$  even approaching .5, the court is of the opinion that none of the models are sufficiently predictive to support inference of discrimination.

The regression equation, discussed in greater detail hereafter, postulates that the value of the dependent variable in a given case is the sum of the coefficients of all of the independent variables plus "U." In the equation the term "U" refers to all unique characteristics of an individual case that have not been controlled for on a system-wide basis. X 51-52. If the model is not appropriately inclusive of all of the systematic factors, then the "U" value will contain influences. X 90. The  $r^2$  value is a summary statistic which describes collectively all of the "U" terms.

Sometimes it is said that "U" measures random effects. Woodworth testified that randomness does not necessarily reflect arbitrariness. He continued, "The world really



isn't random. When we say something is random, we simply mean it's unaccountable, and that whatever does account for it is unique to each case . . . . This randomness that we use is a tag that phenomena which are unpredictable on the basis of variables we have observed [sic]." R 1272-73. By implication this means that even in the 230-variable model it is unique circumstances or uncontrolled-for variables which preponderate over the controlled-for variables in explaining death sentencing rates. This is but another way of saying that the models presented are insufficiently predictive to support an inference of discrimination.

None of the models presented have accounted for the alternative hypothesis that the race effects observed cannot be explained by unaccounted-for factors. This is further illustrated by an experiment that Katz conducted. He observed that when he controlled only for whether or not there had been a murder indictment and tried to predict the outcome based solely on the race of the victim, he obtained a regression coefficient of .07 which was statistically significant at the .00000000000000000005 level. He further observed that by the time Baldus had controlled for 230 variables, the "P" value or test of statistical significance was only approximately .02. He stated as his opinion that the positive value of the race of the victim coefficient would not disappear because it was a convenient variable for the equation to use in explaining actual outcome where so many cases in the sample were white victim cases. It was his opinion, however, that the race of the victim coefficient would become statistically insignificant with a model with a higher  $r^2$  which better accounted for all of the non-racial variables including interaction variables and composite variables which could be utilized. R 1563-70. This methodical decline in statistical significance of the race of the victim and race of the defendant effects as more variables are controlled for is demonstrated graphically in Table 1 which is attached to



the opinion as Appendix A.<sup>2</sup> There, it will be observed that if an additional 20 background variables are added beyond the 230-variable model and the data is adjusted to show the effect on death sentencing rates of appellate review, both the size of the coefficient for race of the victim and race of the defendant decreases by one-third, and the statistical significance decreases to .04 and .05, respectively.<sup>3</sup>

Based on the evidence the court is unable to find either way with respect to Katz's hypothesis. From the evidence offered in support and in contradiction of the hypothesis, the court does learn one thing: It was said that one indication of the completeness of a model is when one can find no additional variables to add which would affect the results obtained. The work by Katz and Woodworth shows instability in the findings of the small order models utilized in the study, and, therefore, it is further evidence that they are not sufficiently designed so as to be reliable. *See generally* R 1729, Table 1, GW 6, Res. Exh. 24.

*Based on all the foregoing, the court finds that none of the models utilized by the petitioner's experts are sufficiently predictive to support an inference of discrimination.*

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<sup>2</sup> The teaching of this chart has a universal lesson for courts. That lesson is that where there is a multitude of factors influencing the decision-maker, a court cannot rely upon tests of statistical significance to validate the data unless it is first shown that the statistical model is sufficiently predictive.

<sup>3</sup> Woodworth commented on this opinion of Katz's. He testified that it was his observation that after about ten variables were added to the model, the precipitous drop in levels of statistical significance leveled out, and therefore, he was of the opinion that it would require the addition of an enormous number of variables to make the coefficient insignificant. He had no opinion as to whether the addition of a number of variables would inevitably remove the effect. In fact, however, the trend line on GW 6 for statistical significance does not remain flat, even in Woodworth's studies. From the 10 to 20-variable models to the 230-variable models, the "P" value declines from something just under .00003 to something just over .005.

### 5. *Multi-Collinearity.*

As illustrated in Table 1, the petitioner introduced a number of exhibits which reflected a positive coefficient for the race of the victim and race of the defendant. The respondent has raised the question of whether or not those coefficients are in fact measuring racial disparities or whether the racial variables are serving as proxies for other permissible factors. Stated another way, the respondent contends that the Baldus research cannot support an inference of discrimination because of multi-collinearity.

If the variables in an analysis are correlated with one another, this is called multi-collinearity. Where this exists the coefficients are difficult to interpret. R 1166. A regression coefficient should measure the impact of a particular independent variable, and it may do so if the other variables are totally uncorrelated and are independent of each other. If, however, there is any degree of interrelationship among the variables, the regression coefficients are somewhat distorted by that relationship and do not measure exactly the net impact of the independent variable of interest upon the dependent variable. Where multi-collinearity obtains, the results should be viewed with great caution.

In the Charging and Sentencing Study a very substantial proportion of the variables are correlated to the race of the victim and to the death sentencing result. R 1141-42. All or a big proportion of the major non-statutory aggravating factors and statutory aggravating factors show positive correlation with both the death sentencing result and the race of the victim. R 1142. More than 100 variables show statistically significant relationships with both death sentencing results and the race of the victim. R 1142. Because of this it is not possible to say with precision what, if any, effect the racial variables have on the dependent variable. R 1148, 1649. According to Baldus, tests of statistical significance will not always

detect errors in coefficients produced by multi-colinearity. R 1138, DB 92.

Katz conducted experiments which further demonstrated the truth of an observation which Baldus made: white-victim cases tend to be more aggravated while black-victim cases tend to be more mitigated. Using the data base of the Procedural Reform Study, Katz conducted an analysis on 196 white-victim cases and 70 black-victim cases which had in common the presence of the statutory aggravating factor B2.<sup>4</sup> Factor by factor, he determined whether white-victim cases or black-victim cases had the higher incidence of each aggravating and mitigating factor. The experiment showed that there were 25 aggravating circumstances which appeared at a statistically significant higher proportion in cases involving one racial group than they did in the other. Of these 25 aggravating circumstances, 23 of these occurred in white-victim cases and only 2 occurred in black-victim cases. Likewise with mitigating factors it was determined that 12 mitigating factors appeared in a higher proportion of black-victim cases whereas only one mitigating feature appeared in a higher proportion of white-victim cases. The results of this latter analysis were also statistically significant. R 1472, *et seq.*, Res.Exh. 28. Similar or more dramatic results were obtained when the experiment was repeated with statutory factors B1, 3, 4, 7, 9 and 10. Res.Exh. 29-34; R 1477-80.

As he had done with the data from the Procedural Reform Study, Katz conducted an analysis to discover the relative presence or absence of aggravating or mitigating circumstances in white- and black-victim cases, using the Charging and Sentencing Study data. Only aggravating or mitigating circumstances, shown to be significant at the .05 level were utilized. Unknown responses were not considered. With but slight exception, each aggravat-

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<sup>4</sup> Katz utilized Baldus's characterization of factors as to whether they were aggravating or mitigating.

ing factor was present in a markedly higher percentage of white-victim cases than in black-victim cases, and conversely, the vast majority of the mitigating circumstances appeared in higher proportions in black-victim cases. Res. Exh. 49, 50, R 1534-35. Similar observations were made with reference to cases disposed of by conviction of voluntary manslaughter. Res.Exh. 51, 52, R 1536.

Yet another experiment was conducted by Katz. He compared the death sentencing rates for killers of white and black victims at steps progressing upwards from the presence of no statutory aggravating circumstances to the presence of six such circumstances. At the level where there were three of four statutory aggravating circumstances present, a statistically significant race of the victim effect appeared. He then compared the aggravating and mitigating circumstances within each group and in each instance found on a factor-by-factor basis that there was a higher number of aggravating circumstances which occurred in higher proportions in white-victim cases and a number of mitigating factors occurred in higher proportions in black-victim cases. The results were statistically significant. Res.Exh. 36, 37, R 1482.

All of the experts except Berk seemed to agree that there was substantial multi-colinearity in the data. Berk found rather little multi-colinearity. R 1756. Woodworth observed that multi-colinearity has the effect of increasing the standard deviation of the regression coefficients, and he observed that this would reduce the statistical significance. According to Woodworth the net effect of multi-colinearity would be to dampen the effect of observed racial variables. R 1279-82. He also testified that he had assured himself of no effect from multi-colinearity because they were able to measure the disparities between white-victim and black-victim cases at similar levels of aggravation. For these two reasons Woodworth had the opinion that higher levels of aggravation in white-victim cases were not relevant to any issue. R 1297.

The court cannot agree with Woodworth's assessment. He and Baldus seem to be at odds about whether tests of

statistical significance will reveal and protect against results produced by multi-collinearity. His second point is also unconvincing. He contends that because he can measure a difference between the death sentencing rate in white-victim cases and black-victim cases at the same level of aggravation (and presumably mitigation), then the positive regression coefficients for this variable are not being produced by multi-collinearity. If Woodworth's major premise were correct, his conclusion might be tenable. The major premise is that he is comparing cases with similar levels of aggravation and mitigation. He is not. As will be discussed hereafter, he is merely comparing cases which have similar aggravation indices based on the variables included in the model. None of Woodworth's models on which he performed his diagnostics are large order regression analyses. Accordingly, they do not account for a majority either of aggravating or mitigating circumstances in the cases. Therefore, in the white-victim cases there are unaccounted-for systematic aggravating features, and in the black-victim cases there are unaccounted-for systematic mitigating features. As will be seen hereafter, aggravating factors do increase the death penalty rate and mitigating factors do decrease the death penalty rate. Therefore, at least to the extent that there are unaccounted-for aggravating or mitigating circumstances, white-victim cases become a proxy for aggravated cases, and black-victim cases become a proxy, or composite variable, for mitigating factors.

*The presence of multi-collinearity substantially diminishes the weight to be accorded to the circumstantial statistical evidence of racial disparity.*

#### 6. *Petitioner's Best Case and Other Observations.*

*Based on what has been said to this point, the court would find that the petitioner has failed to make out a prima facie case of discrimination based either on race of the victim or race of the defendant disparity. There are many reasons, the three most important of which are*



that the data base is substantially flawed, that even the largest models are not sufficiently predictive, and that the analyses do not compare like cases. The case should be at an end here, but for the sake of completeness, further findings are in order. In this section the statistical showings based on the petitioner's most complete model will be set out, together with other observations about the death penalty system as it operates in the State of Georgia.

Woodworth testified, "No, the system is definitely not purely random. This system very definitely sorts people out into categories on rational grounds. And those different categories receive death at different rates." R 1277. An analysis of factors identified by Baldus as aggravating and mitigating, when adjusted to delete unknown values, gives a picture of a rational system when measured against case outcome. Virtually without exception, the presence of aggravating factors increases as the outcome moves from voluntary manslaughter to life sentence to death sentence. Conversely, factors identified by Baldus as being mitigating decrease in presence in cases as the outcome moves from voluntary manslaughter to life sentence to death sentence. R 1532. Res. Exh. 48.

*These observations, other testimony by all of the experts, and the court's own analysis of the data put to rest in this court's mind any notion that the imposition of the death penalty in Georgia is a random event unguided by rational thought. The central question is whether any of the rationales for the imposing or not imposing of the death penalty are based on impermissible factors such as race of the defendant or race of the victim. In Baldus's opinion, based on his entire study, there are systematic and substantial disparities existing in the penalties imposed upon homicide defendants in the State of Georgia based on race of the homicide victim. Further, he was of the opinion that disparities in death sentencing rates do exist based on the race of the defendant, but they are not as substantial and not as systematic as is the case*

with the race of the victim effect. He was also of the opinion that both of these factors were at work in Fulton County. R 726-29. *The court does not share Dr. Baldus's opinion to the extent that it expresses a belief that either of these racial considerations determines who receives the death penalty and who does not.*

Petitioner's experts repeatedly testified that they had added confidence in their opinions because of "triangulation." That is, they conducted a number of different statistical studies and they all produced the same results. R 1081-82. This basis for the opinion is insubstantial for two reasons. First, many tests showed an absence of a race of the defendant effect or an absence of a statistically significant race of the defendant effect or a statistically insignificant modest race of the defendant effect running against white defendants. As will be seen below, the race of the victim effect observed, while more persistent, did not always appear at a statistically significant level in every analysis. Second, Baldus's confidence is predicated upon a navigational concept, triangulation, which presumes that the several bearings being taken are accurate. The lore of the Caribbean basin is rich with tales of island communities supporting themselves from the booty of ships which have foundered after taking bearings on navigational aids which have been mischievously rearranged by the islanders. If one is going to navigate by triangulation, one needs to have confidence in the bearings that are being shot. As discussed earlier, Baldus is taking his bearings off of many models, none of which are adequately inclusive to predict outcomes with any regularity.

Baldus has testified that his 230-variable model contains those factors which might best explain how the death penalty is imposed. The court, therefore, views results produced by that model as the most reliable evidence presented by the petitioner. Additionally, in some tables Baldus employed a 250-variable model which adjusted for death sentencing rates after appellate review by Georgia courts. The race of the victim and race of

the defendant effects, together with the "P" values, are shown in the table below.

TABLE 2  
RACIAL EFFECTS TAKING INTO ACCOUNT ALL  
DECISIONS IN THE SYSTEM—LARGE  
SCALE REGRESSIONS  
Weighted Least Squares Regression Results  
Coefficients and Level of Statistical Significance

<u>230 Variable Model</u>	
<u>Race of the Victim</u>	<u>Race of Defendant</u>
.06 (.02)	.06 (.02)
<u>250 Variable Model</u>	
<u>After Adjustment for Georgia Appellate Review</u>	
<u>Race of the Victim</u>	<u>Race of Defendant</u>
.04 (.04)	.04 (.05)

In viewing Table 2, it is important to keep in mind that it purports to measure the net effect of the racial variables on all decisions made in the system from indictment forward. It shows nothing about the effect of the racial variables on the prosecutor's decision to advance a case to a penalty trial and nothing about the effect of the racial variables on the jury and its decision to impose the death penalty.

At this point it is instructive to know how Dr. Baldus interpreted his own findings on the racial variables. He says that the impact of the racial variable is small. R. 831. The chances that anybody is going to receive a death sentence is going to depend on what the other aggravating and mitigating circumstances are in the case. R. 828. At another point Baldus testified that:

[t]he race of the victim in this system is clearly not the determinant of what happened, but rather that is a factor like a number of other factors, that it plays a role and influences decision making.

The one thing that's, that struck me from working with these data for some time, there is no one factor

that determines what happens in the system. If there were, you could make highly accurate predictions of what's going to happen. This is a system that is highly discretionary, highly complex, many factors are at work in influencing choice, and no one factor dominates the system. It's the result of a combination of many different factors that produce the results that we see, each factor contributing more or less influence.

R 813. And at another point Dr. Baldus interpreted his data as follows:

The central message that comes through is the race effects are concentrated in categories of cases where there's an elevated risk of a death sentence. There's no suggestion in this research that there is a uniform, institutional bias that adversely affects defendants in white victim cases in all circumstances, or a black defendant in all cases. There's nothing to support that conclusion. It's a very complicated system.

R 842.

*Because of these observations, the testimony of other witnesses, and the court's own analysis of the data, it agrees that any racial variable is not determinant of who is going to receive the death penalty, and, further, the court agrees that there is no support for a proposition that race has any effect in any single case.*

An exhibit, DB 95, is produced in part in Table 3 below. It is perhaps the most significant table in the Baldus study. This table measures the race of the victim and the race of the defendant effect in the prosecutorial decision to seek the death sentence and in the jury sentencing decision to impose the death sentence. This is one of the few exhibits prepared by Baldus which utilizes data both from the Procedural Reform Study and the Charging and Sentencing Study. The first column shows

the racial effects after controlling for 230 variables in the Charging and Sentencing Study and 200 variables in the Procedural Reform Study.

TABLE 3  
REGRESSION COEFFICIENTS (WITH THE LEVEL OF  
STATISTICAL SIGNIFICANCE IN PARENTHESES) FOR  
RACIAL VARIABLES IN ANALYSES OF PROSECUTORIAL  
DECISIONS TO SEEK AND JURY DECISIONS TO  
IMPOSE CAPITAL PUNISHMENT

		Controlling for All Factors in File (230 variables in Charging & Sen- tencing Study; 200 variables in Procedural Reform Study)	
		Regardless of Statistical Significant	If Statistically Significant at .10 Level
I. Prosecutor Decision to Seek a Death Sentence			
A. Race of Victim			
1. Charging and Sentencing Study	.21 (.06)	.18 (.0001)	
2. Procedural Reform Study	.12 (.01)	.13 (.0001)	
B. Race of Defendant			
1. Charging and Sentencing Study	.09 (.42)	.14 (.002)	
2. Procedural Reform Study	.01 (.96)	.03 (.41)	
II. Jury Sentencing Decisions <sup>1</sup>			
A. Race of Victim			
1. Charging and Sentencing Study	<sup>2</sup>	.05 (.37)	
2. Procedural Reform Study		.06 (.42)	
B. Race of Defendant			
1. Charging and Sentencing Study		-.04 (.42)	
2. Procedural Reform Study		-.02 (.75)	

<sup>1</sup> Unweighted data used.

<sup>2</sup> Simultaneous adjustment for all factors in the files was not possible because of the limited number of penalty trial decisions. (From DB 95).



The coefficients produced by the 230-variable model on the Charging and Sentencing Study data base produce no statistically significant race of the victim effect either in the prosecutor's decision to seek the death penalty or in the jury sentencing decision. A 200-variable model based on the Procedural Reform data base shows a statistically significant race of the victim effect at work on the prosecutor's decision-making, but that model is totally invalid for it contains no variable for strength of the evidence, a factor which has universally been accepted as one which plays a large part in influencing decisions by prosecutors. Neither model produces a statistically significant race of the defendant effect at the level where the prosecutor is trying to decide if the case should be advanced to a penalty trial. Neither model produces any evidence that race of the victim or race of the defendant has any statistically significant effect on the jury's decision to impose the death penalty. The significance of this table cannot be overlooked. The death penalty cannot be imposed unless the prosecutor asks for a penalty trial and the jury imposes it. *The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either of those decisions in the State of Georgia.*<sup>5</sup>

The same computations were repeated using only factors which were statistically significant at the .10 level.<sup>6</sup> The court knows of no statistical convention which would permit a researcher arbitrarily to exclude factors on the

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<sup>5</sup> As an aside, the court should think that this table should put to rest the sort of stereotypical prejudice against Southern jurisdictions typified in the petitioner's brief by reliance on evidence in the Congressional Record in the 1870's concerning the existence of a disregard by Southern officials for the value of black life.

<sup>6</sup> The regression coefficient of an independent variable would be the same regardless of whether it was a rare event or a frequent event. X 33.

basis of artificial criteria which experience and other research have indicated have some influence on the decisions at issue. The fact that a variable may not be statistically significant is more likely a reflection of the fact that it does not occur often, and not any sort of determination that when it does occur it lacks effect. Accordingly, the second model, set out in Table 3, does not meet the criterion of having been validated by someone knowledgeable about the inner workings of the decision-making process.

The results in the second column are reproduced here because they demonstrate some other properties of the research. It is noted first that the race of the victim effect is lower in the Procedural Reform Study than in the Charging and Sentencing Study. As the Procedural Reform Study represents a universe of all cases and the Charging and Sentencing Study is a random sample, one possible explanation for the disparity in magnitude might be that the sampling techniques utilized in the Charging and Sentencing Study somehow overestimated the coefficients. Another interesting observation from this study is that even when the data is artificially manipulated, no statistically significant race of the victim or race of the defendant effect appears at the jury decision level. Last, this table demonstrates a property of the analyses throughout regarding race of the defendant. To the extent that race of the defendant appears as a factor, it sometimes appears as a bias against white defendants and sometimes appears as a bias against black defendants; very often, whatever bias appears is not statistically significant.

Finally, this table is an illustration of a point which the court made earlier. At the beginning, in assessing the credibility of the witnesses, the court noticed that all seemed to have something of a partisan bias. Thereafter, it noted that the results of certain diagnostics respecting the worst cases analysis in Woodworth's work were not reported in the exhibits given the court. Here, in this

table, we are given no outcomes based on the larger scaled regressions for the racial variables at the jury sentencing level. It is said that the data was not provided because it was not possible to conduct simultaneous adjustment for all factors in the file because of the limited number of penalty trial decisions. From all that the court has learned about the methods employed, it does not understand that the analysis was impossible, but instead understands that because of the small numbers the results produced may not have been statistically significant.

The figures on racial disparities in prosecutorial and jury decision-making do not reflect the effects of racial disparities that might have resulted in earlier phases of the system. R 933. A stepwise regression analysis of the statewide data in the Charging and Sentencing Study was done in an effort to measure the race of the victim and race of the defendant effects at different stages of the procedure from indictment through the imposition of the death penalty.<sup>7</sup> This regression analysis suggested that there is an increased willingness by prosecutors to accept pleas to voluntary manslaughter if the race of the victim is black. R 1062-68, DB 117. This suggests a possibility that the racial effects observed in Table 2 may be the result of bias at a plea bargaining stage.<sup>8</sup> This is not established by the evidence, and it is immaterial to this case, for Baldus did not believe that McCleskey's case would have had any likelihood of being disposed of on a voluntary manslaughter plea. R 1064-65. Baldus

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<sup>7</sup> Stepwise regression is a process carried out by a computer which selects the background variables sequentially based on which provides the best fit. It makes no judgment as to whether or not the variables it selects might in reality have anything to do with the decision. Any model produced by stepwise regression would not meet the legal statistical conventions discussed earlier in that the model is not validated by a person who is by experience or learning acquainted with how the process actually works.

<sup>8</sup> McCleskey was offered a life sentence in return for a guilty plea. (See State Habeas Transcript, Testimony of Turner).

noted that there were strong effects with respect to both race of the defendant and race of the victim at the plea bargaining level. R 1040. It is to be remembered that on this point his data base was far from complete. Finally, it is noted that this study did not attempt to discern if any of the racial disparities noted at the plea bargaining stages could be explained by any of the current theories on the factors governing plea bargaining. R 1159-63.

### 7. *What a Multivariate Regression Can Prove*

Before one can begin to utilize the results of the Baldus study, whether from the larger order regressions or from the small models, an understanding of the techniques employed is necessary. Such an understanding produced in the court's mind other qualifiers which at least in this case substantially diminish the weight of the evidence produced.

Regression analysis is a computational procedure that describes how the average outcome in a process, here the death sentencing rate, is related to particular characteristics of the cases in the system. A least squares regression coefficient displays the average difference in the death penalty rate across all cases caused by the independent variable of interest. In a regression procedure one may theoretically measure the impact of one variable of interest while "controlling" for other independent variables. Conceptually, the coefficient of the variable of interest is the numerical difference in death sentencing rates between all cases which have the variable of interest and all cases which do not. R 689, *et seq.*, 1222-23. The chief assumption of a weighted least square regression is that the effect of the variable of interest is consistent across all cases. Woodworth testified that the assumption was not altogether warranted in this case.<sup>9</sup> That the variable of interest, here race of the victim, is not the same against all cases is graphically seen in a preliminary cross tabulation

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<sup>9</sup> He testified, however, that the data was interpretable because he convinced himself that the violations of the assumption were not in themselves responsible for the findings of significant racial effects. R 1223-24, 1228.



done by Baldus. In this experiment, cases which were similar in that they had a few aggravating and mitigating factors in common were grouped into four subgroups. The race of the victim disparity ranged from a low of .01 through .04 to .15 and finally to .25. The weighted least squares regression coefficient for these same cases was .09. R 781, DB 76, DB 77.

Statistical significance is another term which the court and the parties used regularly. This term connotes a test for rival hypotheses. There is a possibility that an effect could be present purely by chance, or by the chance combination of bad luck in drawing a sample, or by chance combination of events in the charging and sentencing process that may produce an accidental disparity which is not systematic. Statistical significance computes the probability that such a disparity could have arisen by chance, and, therefore, it tests the rival hypothesis that chance accounts for the results that were obtained. R 1244-45. Tests of statistical significance are a measure of the amount by which the coefficient exceeds the known standard deviation in the variable, taking into account the size of the sample. Considering the values used in this study, a statistical significance at the .05 level translates into a two-standard deviation disparity, and a statistical significance at the .01 level approaches a three-standard deviation level. R 1246-47. R 712-17. As noted earlier a low "P" value, a measure of statistical significance, does not, at least in the case of multi-variate analysis, assure that the effect observed by any one model is in fact real.

The use of regression analysis is subject to abuse. Close correlations do not always say anything about causation. Further, a regression analysis is no better than the data that went into the analysis. It is possible to obtain a regression equation which shows a good statistical fit in the sense of both low "P" values and which  $r^2$  values where one has a large number of variables, even when it is known in advance that the data are totally unrelated to each other. R 1636-37.



What the regression procedure does by algebraic adjustment is somewhat comparable to a cross tabulation analysis. It breaks down the cases into different sub-categories which are regarded as having characteristics in common. The variable of interest is calculated for each sub-category and averaged across all sub-categories. R 791-92.

The model tries to explain the dependent variable by the independent variables that it is given. It does this by trying to make the predicted outcome the same as the actual outcome in terms of the factors that it is given. R 1487-88. For example, if a regression equation were given ten independent variables in a stagewise process, it would guess at the regression coefficient for the first variable by measuring the incremental change in the dependent variable caused by the addition of cases containing a subsequent independent variable. X 29. After the initial mathematical computation, the equation then goes back and re-computes the coefficients it arrived at earlier, using all of the subsequent regression coefficients that it has calculated. It continues to go through that process until coefficients which best predict actual outcome are arrived at for each variable. X 43-46.

By its nature, then, the regression equation can produce endless series of self-fulfilling prophecies because it always attempts to explain actual outcomes based on whatever variables it is given. If, for example, the data base included information that of the 128 defendants who received the death penalty, 122 of them were right-handed, the regression equation would show that the system discriminated against right-handed people. This is so because that factor occurs so often that it is the most "obvious" or "easy" explanation for the outcomes observed. In the case at bar, there are 108 white-victim cases where death was imposed and 20 black-victim cases where death was imposed. DB 63. Accordingly, the regression coefficients for the racial variables could have been artificially produced because of the high incidence of cases in which the victim was white.

Another feature of Baldus's analyses is that he is trying to explain dichotomous outcomes (life or death) with largely dichotomous independent variables (multiple stabbing present or not present) and a regression equation requires continuous dependent and independent variables. Accordingly, Baldus developed indices for the dependent variable (whether or not the death penalty was imposed). He utilized an average rate for a group of cases. For the independent variables he developed an artificial measure of similarity called an aggravation index to control simultaneously for aggravating and mitigating circumstances so that cases could be ranked on a continuous scale. R 1484. It is important to understand that the cases being compared in the regression analyses used here are not at all factually similar. Their principal identity is that their aggravation index, the total of all positive regression coefficients minus all negative regression coefficients, is similar. X 14-15. The whole study rests on the presumption that cases with similar aggravation indexes are similarly situated. R 1311. This presumption is not only rebuttable, it is rebutted, if by nothing else, then by common sense. As Justice Holmes observed in *Towne v. Eisner*, 245 U.S. 418, 38 S.Ct. 158, 62 L.Ed. 372 (1918):

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

*Id.* at 425, 38 S.Ct. at 159, quoting *Lamar v. United States*, 240 U.S. 60, 65, 36 S.Ct. 255, 256, 60 L.Ed. 526 (1916). The same thought, it seems to the court, is apropos for the aggravation index. It allows a case with compelling aggravating circumstances, offset only by a series of insignificant mitigating circumstances, to be counted as equal to a case with the same level of aggravation and one substantial mitigating factor having the same numerical value as the series of trifling ones in the first case. The court understands that strength of the evi-

dence measures generally are positive coefficients. To the extent that this is true, a strong evidentiary case with weak aggravating circumstances would be considered the same as a brutal murder with very weak evidence. Other examples abound, but the point is that there is no logical basis for the assumption that cases with similar aggravation indices are at all alike. Further, the aggravation index for any given case is a function of the variables that are included in the model. Any change in the variables included in the model will also change the aggravation index of most, if not all, cases.

The variability of the aggravation index as factors are added or deleted is well demonstrated by Respondent's Exhibit 40. One case comparison will serve as an example. In a life sentence case, C 54, an aggravation index (or predicted outcome index, R 1485) was computed using a six-variable model. Calculation produced an index of .50. Katz conducted four additional regressions, each adding additional factors. By the time the more inclusive regression number five was performed, the aggravation index or predicted outcome was .08 (0 equals no death penalty, 1 equals death penalty). In a death case, C 66, the first regression analysis produced an index of .50. However, the aggravation coefficient or predicted outcome rose to .89 when the facts of the case were subjected to the fifth regression analysis. Thence, two cases which under one regression analysis appeared to be similar, when subjected to another analysis may have a totally different aggravation index. ResExh. 40, R 1483-1501.

In interpreting the Baldus data it is important to understand what he means when he says that he has controlled for other independent variables or held other individual variables constant. What these terms usually mean is that a researcher has compared cases where the controlled-for variables are present in each case and where the cases are divided into groups where the variable of interest is present and where the variable of interest is not present. That is not what occurs in regression

analysis. To be sure, the cases are divided into groups where the variable of interest is present and groups where it is not present. There is, however, absolutely no assurance that the background variables being controlled for are present in all of the cases, in any of the cases, or present in the same combination in any of the cases. Consequently, other factors are not being held constant as that term is usually used. *See generally* R 152, X 7, 19-25.

Courts are accustomed to looking at figures on racial disparity and understanding that the figure indicates the extent or degree of the disparity. It is often said that statistical evidence cannot demonstrate discrimination unless it shows gross disparities. Contrary to the usual case, the court has learned that at least in this case the size of a regression coefficient, even one statistically significant at the .05 level, says nothing about the specific degree of disparity or discrimination in the system. All the regression coefficient indicates is that the difference in average outcome where the racial variable is present from cases where it is not present is large enough to enable one to say that the true mean of both groups are not exactly equal. R 1635, 1670-71. Baldus made an effort to demonstrate the relative importance of the racial variables by showing them in an array of coefficients for other variables. The court later learned, however, that where some of the variables are binary or dichotomous and some are continuous (for example, number of mitigating features present), one cannot use the size of the regression coefficient as an indication of the relative strength of one variable to another. R 1783.

Consistent with the difficulty in quantifying the effect of any variable found to be at work in the system, Baldus testified that a regression analysis really has no way of knowing what particular factors carry the most weight with the decision-maker in any one case. R 1141. Based on his entire analysis Baldus was unable to quantify the effect that race of the victim may have had in McCleskey's case. R 1083-85. After a review of the Baldus study, Berk

was unable to say whether McCleskey was singled out to receive the death penalty because his victim was white, nor was he able to say that McCleskey would have escaped the death penalty if his victim had been black. Berk went on to testify:

Models that are developed talk about the effects on the average. They do not depict the experience of a single individual. What they say, for example, that on the average, the race of the victim, if it is white, increases on the average the probability . . . (that) the death sentence would be given.

Whether in a given case that is the answer, it cannot be determined from statistics. R 1785.

*In summary, then, Baldus's findings from the larger scale regressions or from any of the others must be understood in light of what his methods are capable of showing. They do not compare identical cases, and the method is incapable of saying whether or not any factor had a role in the decision to impose the death penalty in any particular case. A principal assumption which must be present for a regression analysis to be entirely reliable is that the effects must be randomly distributed—that is not present in the data we have. The regression equation is incapable of making qualitative judgments and, therefore, it will assign importance to any feature which appears frequently in the data without respect to whether that factor actually influences the decision-maker. Regression analysis generally does not control for back-ground variables as that term is usually understood, nor does it compare identical cases. Because Baldus used an index method, comparable cases will change from model to model. The regression coefficients do not quantitatively measure the effect of the variables of interest.*

*With these difficulties, it would appear that multivariate analysis is ill suited to provide the court with circumstantial evidence of the presence of discrimination, and it*



is incapable of providing the court with measures of qualitative difference in treatment which are necessary to a finding that a *prima facie* case has been established with statistical evidence. Finally, the method is incapable of producing evidence on whether or not racial factors played a part in the imposition of the death penalty in any particular case. To the extent that McCleskey contends that he was denied either due process or equal protection of the law, his methods fail to contribute anything of value to his cause.

#### 8. *A Rebuttal to the Hypothesis*

A part of Baldus's hypothesis is that the system places a lower value on black life than on white life. If this is true, it would mean that the system would tolerate higher levels of aggravation in black victim cases before the system imposes the death penalty.

The respondent postulates a test of this thesis. It is said that if Baldus's theory is correct, then one would necessarily find aggravation levels in black-victim cases where a life sentence was imposed to be higher than in white-victim cases. This seems to the court to be a plausible corollary to Baldus's proposition. To test this corollary, Katz, analyzing aggravating and mitigating factors one by one, demonstrated that in life sentence cases, to the extent that any aggravating circumstance is more prevalent in one group than the other, there are more aggravating features in the group of white-victim cases than in the group of black-victim cases. Conversely, there were more mitigating circumstances in which black-victim cases had a higher proportion of that circumstance than in white-victim cases. R 1510-15, 1540, Res. Exh. 43, 53, 54.

Because Katz used one method to demonstrate relative levels of aggravation and Baldus used another, his index method, the court cannot say that this experiment alone conclusively demonstrates that Baldus's theory is wrong.

It is, however, direct rebuttal evidence of the theory; and as such, stands to contradict any prima facie case of system-wide discrimination based on race of the victim even if it can be said that the petitioner has indeed established a prima facie case. The court does not believe that he has.

#### 9. *Miscellaneous Observations on the Statewide Data.*

So that a reader may have a better feeling of subsidiary findings in the studies and a better understanding of collateral issues in the case, some additional observations are presented on Baldus's study.

Some general characteristics of the sample contained in the Charging and Sentencing Study which the court finds of interest are as follows. The largest group of defendants was in the 18 to 25-year-old age group. Only ten percent had any history of mental illness. Only three percent were high status defendants. Only eight percent of the defendants were from out of state. Females comprised 13% of the defendants. Of all the defendants in the study 35% had no prior criminal record, while 65% had some previous conviction. Co-perpetrators were not involved in 79% of the cases, and 65% of the homicides were committed by lovers in a rage. High emotion in the form of hate, revenge, jealousy or rage was present in 66% of the cases. Only one percent of the defendants had racial hatred as a motive. Victims provoked the defendant in 48% of the cases. At trial 26% confessed and offered no defense. Self defense was claimed in 33% of the cases, while only two percent of the defendants relied upon insanity or delusional compulsion as a defense. Defendants had used alcohol or drugs immediately prior to the crime in 38% of the cases. In only 24% of the cases was a killing planned for more than five minutes. Intimate associates, friends, or family members accounted for 44% of the victims. Black defendants accounted for 67% of the total, and only 12% of the homicides were

committed across racial lines. The largest proportion (58%) of the homicides were committed by black defendants against black victims. R 659, *et seq.*, DB 60.<sup>10</sup>

From the data in the Charging and Sentencing Study it is learned that 94% of all homicide indictments were for murder. Of those indicted for murder or manslaughter 55% did not plead guilty to voluntary manslaughter. There were trials for murder in 45% of the cases and 31% of the universe was convicted of murder. In only ten percent of the cases in the sample was a penalty trial held, and in only five percent of the sample were defendants sentenced to death. DB 58, R 64-65. *See also* DB 59, R 655.

In his analysis of the charging and sentencing data, Baldus considered the effect of Georgia statutory aggravating factors on death sentencing rates, and several things of interest developed. The statutory aggravating circumstances are highly related or correlated to one another. That is to say that singularly the factors have less impact than they do in combination. Even when the impact of the statutory aggravating circumstances is adjusted for the impact of the presence of others, killing to avoid arrest increased the probability of a death sentence by 21 points, and committing a homicide during the course of a contemporaneous felony increased the probability of getting the death penalty by 12 points. R 709-11, DB 68. Where the B8 and B10 factors are present together, the death penalty rate is 39%. DB 64. Based on these preliminary studies one might conclude that a

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<sup>10</sup> One thing of interest came out in DB 60 concerning the evaluation of the coders. In their judgment 92% of all the police reports that they studied indicated clear guilt. This is interesting in view of the fact that only 69% of all defendants tried for murder were convicted. This suggests either that the coders did not have enough experience to make this evaluation, or the more likely explanation is that the Parole Board summaries were obtained from official channels and only had the police version and had little if any gloss on the weaknesses of the case from the defendant's perspective.

defendant committing a crime like McCleskey's had a greatly enhanced probability of getting the death penalty.

Of the 128 death sentences in the Charging and Sentencing Study population, 105 of those were imposed where the homicide was committed during the course of an enumerated contemporary offense. Further, it is noted that the probability of obtaining the death penalty is one in five if the B2 factor is present, a little better than one in five if the victim is a policeman or fireman, and the probability of receiving the death penalty is about one in three if the homicide was committed to avoid arrest. These, it is said, are the three statutory aggravating factors which are most likely to produce the death penalty, and all three were present *de facto* in McCleskey's case. DB 61.

When the 500 most aggravated cases in the system were divided into eight categories according to the level of the aggravation index, the death penalty rate rose dramatically from 0 in the first two categories, to about 7% in the next two, to an average of about 22% in the next two, to a 41% rate at level seven, and an 88% rate at level eight. Level eight was composed of 58 cases. The death sentencing rate in the 40 most aggravated cases was 100%. DB 90, R 882. Baldus felt that data such as this supported a hypothesis arrived at earlier by other social science researchers. This theory is known as the liberation hypothesis. The postulation is that the exercise of discretion is limited in cases where there is little room for choice. If the imposition of the death penalty or the convicting of a defendant is unthinkable because the evidence is just not there, or the aggravation is low, or the mitigation is very high, no reasonable person would vote for conviction or the death penalty, and, therefore, impermissible factors such as race effects will not be noted at those points. But, according to the theory, when one looks at the cases in the mid-range where the facts do not clearly call for one choice or the other, the decision-maker has broader freedom to exercise discre-

tion, and in that area you see the effect of arbitrary or impermissible factors at work. R 884, R 1135.<sup>11</sup>

Baldus did a similar rank order study for all cases in the second data base. He divided the cases into eight categories with the level of aggravation increasing as the category number increased. In this analysis he controlled for 14 factors, but the record does not show what those factors were. The experiment showed that in the first five categories the death sentencing rate was less than one percent, and there was no race of the victim or race of the defendant disparity observed. At level six and nine statistically significant race of the victim disparities appeared at the 9 point and 27 point order of magnitude. Race of the defendant disparities appeared at the last three levels, but none were statistically significant. A minor race of the victim disparity was noted at level 7 but the figure was not significant. The observed death sentencing rates at the highest three levels were two percent, three percent, and 39%. DB 89. Exhibit DB 90 arguably supports Baldus's theory that the liberation hypothesis may be at work in the death penalty system in that it does show higher death sentencing rates in the mid-range cases than in those cases with the lowest and highest aggravation indices. On the other hand, Exhibit DB 89, which, unlike DB 90, is predicated on a multiple regression analysis, shows higher racial disparities in the most aggravated level of cases and lower or no racial disparities in the mid-range of aggravation. Accordingly,

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<sup>11</sup> Part of the moral force behind petitioner's contentions is that a civilized society should not tolerate a penalty system which does not avenge the murder of black people and white people alike. In this connection it is interesting to note that in the highest two categories of aggravation there were only ten cases where the murderer of a black victim did not receive the death penalty while in eleven cases the death penalty under similar circumstances was imposed. This is not by any means a sophisticated statistical analysis, but even in its simplicity it paints no picture of a systematic deprecation of the value of black life.



the court is unable to find any convincing evidence that the liberation hypothesis is applicable in this study.

Baldus created a 39-variable model which was used for various diagnostics. It was also used in an attempt to demonstrate that given the facts of McCleskey's case, the probability of his receiving the death penalty because of the operation of impermissible factors was greatly elevated. Although the model is by no means acceptable,<sup>12</sup> it is necessary to understand what is and is not shown by the model, as it is a centerpiece for many conclusions by petitioner's experts. On the basis of the 39-variable model McCleskey had an aggravation score of .52. Woodworth estimated that at McCleskey's level of aggravation the incremental probability of receiving the death penalty in a white-victim case is between 18 and 23 percentage points. R 1294, 1738-40, GW 5, Fig. 2. If a particular aggravating circumstance were left out in coding McCleskey's case, it would affect the point where his case fell on the aggravation index. R 1747. Judging from the testimony of Officer Evans, McCleskey showed no remorse about the killing and, to the contrary, bragged about the killing while in jail. While both of these are variables

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<sup>12</sup> This model has only one strength of the evidence factor (DCONFESS) and that occurs only in 26 percent of the cases. Many other aggravating and mitigating circumstances which the court has come to understand are significant in explaining the operation of the system in Georgia are omitted. Among these are that the homicide arose from a fight or that it was committed by lovers in a rage. A variable for family, lover, liquor, barroom quarrel is included, and it might be argued that this is a proxy. However, the court notes from DB 60 that the included variable occurs in only 1,246 cases whereas the excluded variable (MADLOVER) occurs in 1,601 cases. Therefore, the universe of cases is not coextensive. Others which are excluded are variables showing that the victim was forced to disrobe; that the victim was found without clothing; that the victim was mutilated; that the defendant killed in a rage; that the killing was unnecessary to carry out the contemporaneous felony; that the defendant was provoked; that the defendant lacked the intent to kill; that the defendant left the scene of the crime; that the defendant resisted arrest; and that the victim verbally provoked the defendant.

available in the data base, neither is utilized in the model. If either were included it should have increased McCleskey's index if either were coded correctly on McCleskey's questionnaire. Both variables on McCleskey's questionnaire were coded as "U," and so even if the variables had been included, McCleskey's aggravation index would not have increased because of the erroneous coding. If the questionnaire had been properly encoded and if either of the variables were included, McCleskey's aggravation index would have increased, although the court is unable to say to what degree. Judging from GW 8, if that particular factor had a coefficient as great as .15, the 39-variable or "mid-range" model would not have demonstrated any disparity in sentencing rates as a function of the race of the victim.

Katz conducted an experiment aimed at determining whether the uncertainty in sentencing outcome in mid-range could be the result of imperfections of the model. He arbitrarily took the first 100 cases in the Procedural Reform Study. He then created five different models with progressively increasing numbers of variables. His six-variable model had an  $r^2$  of .26. His 31-variable model had an  $r^2$  of .95.<sup>13</sup> Using these regression equations he computed the predictive outcome for each case using the aggravation index arrived at through his regression equations. As more variables were added, aggravation coefficients in virtually every case moved sharply toward 0 in life sentence cases and sharply toward 1 in death sentence cases. Respondent's Exhibit 40. In the five regression models designed by Katz, McCleskey's aggravation score, depending on the number of independent variables included, was .70, .75, 1.03, .87, and .85. R 1734, Res.Exh. 40.

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<sup>13</sup> Katz testified that in most cases he randomly selected variables and in the case of the 31-variable model selected those variables arbitrarily which would most likely predict the outcome in McCleskey's case.

*Based on the foregoing the court is not convinced that the liberation hypothesis is at work in the system under study. Further, the court is not convinced that even if the hypothesis was at work in the system generally that it would suggest that impermissible factors entered into the decision to impose the death penalty upon McCleskey.*

On another subject, Baldus testified that in a highly decentralized decision-making system it is necessary to the validation of a study to determine if the effects noted system-wide obtain when one examines the decisions made by the compartmentalized decision-makers. R 964-69. An analysis was done to determine if the racial disparities would persist if decisions made by urban decision-makers were compared with decisions made by rural decision-makers.<sup>14</sup> No statistically significant race of the victim or race of the defendant effect was observed in urban decision-making units. A .08 effect, significant at the .05 level, was observed for race of the victim in rural decision-making units, but when logistic regression analysis was used, the effect became statistically insignificant. The race of the defendant effect in the rural area was not statistically significant. The decisions in McCleskey's case were made by urban decision-makers.

Finally, the court makes the following findings with reference to some of the other models utilized by petitioner's experts. As noted earlier some were developed through a procedure called stepwise regression. What stepwise regression does is to screen the variables that are included in the analysis and include those variables which make the greatest net contribution to the  $r^2$ . The computer program knows nothing about the nature of those variables and is not in a position to evaluate whether or not the variable logically would make a dif-

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<sup>14</sup> Based on the court's knowledge of the State of Georgia, it appears that Baldus included many distinctly rural jurisdictions in the category of urban jurisdictions.

ference. If the variables are highly correlated, the effect quite frequently is to drop variables which should not be dropped from a subject matter or substantive point of view and keep variables in that make no sense conceptually. So, stepwise regression can present a very misleading picture through the presentation of models which have relatively high  $r^2$  and have significant coefficients but which models do not really mean anything. R 1652. *Because of this the court cannot accord any weight to any evidence produced by the model created by stepwise regression.*

Woodworth conducted a number of tests on five models to determine if his measures of statistical significance were valid. As there were no validations of the models he selected and none can fairly be said on the basis of the evidence before the court to model the criminal justice system in Georgia, Woodworth's diagnostics provide little if any corroboration to the findings produced by such models. R 1252, *et seq.*, GW 4, Table 1.

In Exhibits DB 96 and DB 97, outcomes which indicate racial disparities at the level of prosecutorial decision-making and jury decision-making are displayed. At the hearing the court had thought that the column under the Charging and Sentencing Study might be the product of a model which controlled for sufficient background variables to make it partially reliable. Since the hearing the court has consulted Schedule 8 of the Technical Appendix (DB 96A) and has determined that only eleven background variables have been controlled for, and many significant background variables are omitted from the model. The other models tested in DB 96 and 97 are similarly under-inclusive. (In this respect compare the variables listed on Schedule 8 through 13, inclusive, of the Technical Appendix with the variables listed in DB 59.) For this reason the court is of the opinion that DB 96 and DB 97 are probative of nothing.

### 10. *The Fulton County Data.*

McCleskey was charged and sentenced in Fulton County, Georgia.<sup>15</sup> Recognizing that the impact of factors, both permissible and impermissible, do vary with the decision-maker, and recognizing that some cases in this circuit have required that the statistical evidence focus on the decisions where the sentence was imposed, petitioner's experts conducted a study of the effect of racial factors on charging and sentencing in Fulton County.

The statistical evidence on the impact of racial variables is inconclusive. If one controls for 40 or 50 background variables, multiple regression analysis does not produce any statistically significant evidence of either a race of the defendant or race of the victim disparity in Fulton County. R 1000. Baldus used a stepwise regression analysis in an effort to determine racial disparities at different stages of the criminal justice system in the county. The stepwise regression procedure selected 23 variables. Baldus made no judgment at all concerning the appropriateness of the variables selected by the computer. The study indicated a statistically significant race of the victim and race of the defendant effect at the plea bargaining stage and at the stage where the prosecutor made the decision to advance the case to a penalty trial. Overall, there was no statistically significant evidence that the race of the victim or race of the defendant played any part in who received the death penalty and who did not. As a matter of fact, the coefficients for these two variables were very modestly negative which would indicate a higher death sentencing

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<sup>15</sup> As part of its findings on the Fulton County data, the court finds that there are no guidelines in the Office of the District Attorney of the Atlanta Judicial Circuit to guide the exercise of discretion in determining whether or not to seek a penalty trial. Further, it was established that there was only one black juror on McCleskey's jury. R 1316.



rate in black-victim cases and in white-defendant cases. Neither of the coefficients, however, approach statistical significance. R 1037-49.

The same patterns observed earlier with reference to the relative aggravation and mitigation of white and black-victim cases, respectively, continue when the Fulton County data is reviewed. In Fulton County, as was the case statewide, cases in which black defendants killed white victims seemed to be more aggravated than cases in which white defendants killed white victims. R 1554, 1561, Res.Exh. 68.

Based on DB 114 and a near neighbor analysis, Baldus offered the opinion that in cases where there was a real risk of a death penalty one could see racial effects. R 1049-50. DB 114 is statistically inconclusive so far as the court can determine. The cohort study or near neighbor analysis also does not offer any support for Baldus's opinion. Out of the universe of cases in Fulton County Baldus selected 32 cases that he felt were near neighbors to McCleskey. These ran the gambit from locally notorious cases against Timothy Wes McCorquodale, Jack Carlton House, and Marcus Wayne Chennault, to cases that were clearly not as aggravated as McCleskey's case. Baldus then divided these 32 cases into three groups: More aggravated, equal to McCleskey, and less aggravated.

The court has studied the cases of the cohorts put in the same category as McCleskey and cannot identify either a race of the victim or race of the defendant disparity. All of the cases involve a fact pattern something like McCleskey's case in that the homicides were committed during the course of a robbery and in that the cases involve some gratuitous violence, such as multiple gunshots, etc. Except in one case, the similarities end there, and there are distinctive differences that can explain why either no penalty trial was held or no death sentence was imposed.

As noted above, Dr. Baldus established that the presence of the B10 factor, that is that the homicide was committed to stop or avoid an arrest, had an important predictive effect on the imposition of the death penalty. Also, the fact that the victim was a police officer had some predictive effect. Keeping these thoughts in mind, we turn to a review of the cases. Defendant Thornton's case (black defendant/black victim) did not involve a police officer. Further, Thornton was very much under the influence of drugs at the time of the homicide and had a history of a "distinct alcohol problem." In Dillard's case (black defendant/black victim) the homicide was not necessary to prevent an arrest and the victim was not a police officer. Further, Dillard's prior record was less serious than McCleskey's. In Leach's case (black defendant/black victim) the homicide was not committed to prevent an arrest and the victim was not a police officer. Further, Leach had only one prior felony and that was for motor vehicle theft. Leach went to trial and went through a penalty trial. Nowhere in the coder's summary is there any information available on Leach's defense or on any evidence of mitigation offered.

In the case of Gantt (black defendant/white victim) the homicide was not committed to avoid an arrest and the victim was not a police officer. Further, Gantt relied on an insanity defense at trial and had only one prior conviction. Crouch's case (white defendant/white victim) did not involve a homicide committed to prevent an arrest and the victim was not a police officer. Crouch's prior record was not as severe as McCleskey's and, unlike McCleskey, Crouch had a prior history of treatment by a mental health professional and had a prior history of habitual drug use. Further, and importantly, the evidence contained in the summary does not show that Crouch caused the death of the victim.

Arnold is a case involving a black defendant and a white victim. The facts are much the same as McCleskey's except that the victim was not a police officer but

was a storekeeper. Arnold's case is aggravated by the fact that in addition to killing the victim, he shot at three bystander witnesses as he left the scene of the robbery, and he and his co-perpetrators committed another armed robbery on that day. Arnold was tried and sentenced to death. Henry's case (black defendant/white victim) did not involve a homicide to escape an arrest or a police victim. Henry's prior record was not as serious as McCleskey's, and, from the summary, it would appear that there was no direct evidence that the defendant was the triggerman, nor that the State considered him to be the triggerman.

In sum, it would seem to the court that Arnold and McCleskey's treatments were proportional and that their cases were more aggravated and less mitigated than the other cases classified by Baldus as cohorts. This analysis does not show any effect based either upon race of the defendant or race of the victim. *See generally* R 985-99, DB 110.

Another type of cohort analysis is possible using Fulton County data. There were 17 defendants charged in connection with the killing of a police officer since *Furman*. Six of those in Baldus's opinion were equally aggravated to McCleskey's case. Four of the cases involved a black defendant killing a white officer; two involved a black defendant killing a black officer; and one involved a white defendant killing a white officer. There were two penalty trials. McCleskey's involved a black defendant killing a white officer; the other penalty trial involved a black defendant killing a black officer. Only McCleskey received a death sentence. Three of the offenders pled guilty to murder, and two went to trial and were convicted and there was no penalty trial. *On the basis of this data and taking the liberation hypothesis into account, Baldus expressed the opinion that a racial factor could have been considered, and that factor might have tipped the scales against McCleskey.* R 1051-56, DB 116. *The court considers this opinion unsupported conjecture by Baldus.*

#### D. Conclusions of Law

Based upon the legal premises and authorities set out above the court makes these conclusions of law.

The petitioner's statistics do not demonstrate a *prima facie* case in support of the contention that the death penalty was imposed upon him because of his race, because of the race of the victim, or because of any Eighth Amendment concern. Except for analyses conducted with the 230-variable model and the 250-variable model, none of the other models relied upon by the petitioner account to any substantial degree for racially neutral variables which could have produced the effect observed. The state-wide data does not indicate the likelihood of discriminatory treatment by the decision-makers who sought or imposed the death penalty and the Fulton County data does not produce any statistically significant evidence on a validated model nor any anecdotal evidence that race of the victim or race of the defendant played any part in the decision to seek or impose the death penalty on McCleskey.

The data base for the studies is substantially flawed, and the methodology utilized is incapable of showing the result of racial variables on cases similarly situated. Further, the methods employed are incapable of disclosing and do not disclose quantitatively the effect, if any, that the two suspect racial variables have either state-wide, county-wide or in McCleskey's case. Accordingly, a court would be incapable of discerning the degree of disparate treatment if there were any. Finally, the largest models utilized are insufficiently predictive to give adequate assurances that the presence of an effect by the two racial variables is real.

Even if it were assumed that McCleskey had made out a *prima facie* case, the respondent has shown that the results are not the product of good statistical methodology and, further, the respondent has rebutted any *prima facie* case by showing the existence of another explanation for the observed results, i.e., that white victim cases are act-

ing as proxies for aggravated cases and that black victim cases are acting as proxies for mitigated cases. Further rebuttal is offered by the respondent in its showing that the black-victim cases being left behind at the life sentence and voluntary manslaughter stages, are less aggravated and more mitigated than the white-victim cases disposed of in similar fashion.

Further, the petitioner has failed to carry his ultimate burden of persuasion. Even in the state-wide data, there is no consistent statistically significant evidence that the death penalty is being imposed because of the race of the defendant. A persistent race of the victim effect is reported in the state-wide data on the basis of experiments performed utilizing models which do not adequately account for other neutral variables. These tables demonstrate nothing. When the 230-variable model is utilized, a race of the victim and race of the defendant effect is demonstrated. When all of the decisions made throughout the process are taken into account it is theorized but not demonstrated that the point in the system at which these impermissible considerations come into play is at plea bargaining. The study, however, is not geared to, nor does it attempt to control for other neutral variables to demonstrate that there is unfairness in plea bargaining with black defendants or killers of white victims. In any event, the petitioner's study demonstrates that at the two levels of the system that matter to him, the decision to seek the death penalty and the decision to impose the death penalty, there is no statistically significant evidence produced by a reasonably comprehensive model that prosecutors are seeking the death penalty or juries are imposing the death penalty because the defendant is black or the victim is white. Further, the petitioner concedes that his study is incapable of demonstrating that he, specifically, was singled out for the death penalty because of the race of either himself or his victim. Further, his experts have testified that neither racial variable preponderates in the decision-making and, in the final analysis, that the seeking or the



imposition of the death penalty depends on the presence of neutral aggravating and mitigating circumstances. For this additional reason, the court finds that even accepting petitioner's data at face value, he has failed to demonstrate that racial considerations caused him to receive the death penalty.

For these, among other, reasons the court denies the petition for a writ of habeas corpus on this issue.

### III. CLAIM "A"—THE GIGLIO CLAIM.

Petitioner asserts that the failure of the State to disclose an "understanding" with one of its key witnesses regarding pending criminal charges violated petitioner's due process rights. In *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, L.Ed.2d 104 (1971) the Supreme Court stated:

As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 [55 S.Ct. 340, 341, 79 L.Ed. 791] (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 [63 S.Ct. 177, 87 L.Ed. 214] (1942). In *Napue v. Illinois*, 360 U.S. 264 [79 S.Ct. 1173, 3 L.Ed.2d 1217] (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 269 [79 S.Ct. at 1177]. Thereafter *Brady v. Maryland*, 373 U.S. [83], at 87 [83 S.Ct. at 1194, 10 L.Ed.2d 215], held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credi-

bility falls within this general rule. 405 U.S. 150, 153-54, 92 S.Ct. 763, 765-66, 31 L.Ed. 104.

In *Giglio* an Assistant United States Attorney had promised leniency to a co-conspirator in exchange for his testimony against defendant. However, the Assistant U.S. Attorney who handled the case at trial was unaware of this promise of leniency and argued to the jury that the witness had "received no promises that he would not be indicted." The Supreme Court held that neither the Assistant's lack of authority nor his failure to inform his superiors and associates was controlling. The prosecution's duty to present all material evidence to the jury was not fulfilled and thus constituted a violation of due process requiring a new trial. *Id.* at 150, 92 S.Ct. at 763.

It is clear from *Giglio* and subsequent cases that the rule announced in *Giglio* applies not only to traditional deals made by the prosecutor in exchange for testimony but also to any promises or understandings made by any member of the prosecutorial team, which includes police investigators. See *United States v. Antone*, 603 F.2d 566, 569 (5th Cir.1979) (*Giglio* analysis held to apply to understanding between investigators of the Florida Department of Criminal Law Enforcement and the witness in a federal prosecution). The reason for giving *Giglio* such a broad reach is that the *Giglio* rule is designed to do more than simply prevent prosecutorial misconduct. It is also a rule designed to insure the integrity of the truth-seeking process. As the Fifth Circuit stated in *United States v. Cawley*, 481 F.2d 702 (5th Cir.1973), "[w]e read *Giglio* and [*United States v.*] *Tashman and Goldberg* (sic) [478 F.2d 129 (5th Cir., 1973)] to mean simply that the jury must be apprised of any promise which induces a key government witness to testify on the government's behalf." *Id.* at 707. More recently, the Eleventh Circuit has stated:

The thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might moti-

vate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury. We must focus on "the impact on the jury." *Smith v. Kemp*, 715 F.2d 1459, 1467 (11th Cir.1983) (quoting *United States v. Anderson*, 574 F.2d 1347, 1356 (5th Cir.1978)).

In the present case the State introduced at petitioner's trial highly damaging testimony by Offie Gene Evans, an inmate of Fulton County Jail, who had been placed in solitary confinement in a cell adjoining petitioner's. Although it was revealed at trial that the witness had been charged with escaping from a federal halfway house, the witness denied that any deals or promises had been made concerning those charges in exchange for his testimony.<sup>16</sup>

<sup>16</sup> On direct examination the prosecutor asked:

Q: Mr. Evans have I promised you anything for testifying today?

A: No, sir, you ain't.

Q: You do have an escape charge still pending, is that correct?

A: Yes, sir. I've got one, but really it ain't no escape, what the peoples out there tell me, because something went wrong out there so I just went home. I stayed at home and when I called the man and told him that I would be a little late coming in, he placed me on escape charge and told me there wasn't no use of me coming back, and I just stayed on at home and he come and picked me up.

Q: Are you hoping that perhaps you won't be prosecuted for that escape?

A: Yeah, I hope I don't, but I don't—what they tell me, they ain't going to charge me with escape no way.

Q: Have you asked me to try to fix it so you wouldn't get charged with escape?

A: No, sir.

Q: Have I told you I would try to fix it for you?

A: No, sir.

Trial Transcript at 868.

On cross-examination by petitioner's trial counsel Mr. Evans testified:

The jury was clearly left with the impression that Evans was unconcerned about any charges which were pending against him and that no promises had been made which would affect his credibility. However, at petitioner's state habeas corpus hearing Evans testified that one of the detectives investigating the case had promised to speak to federal authorities on his behalf.<sup>17</sup> It was further revealed that the escape charges pending against Evans were dropped subsequent to McCleskey's trial.

After hearing the testimony, the habeas court concluded that the mere *ex parte* recommendation by the detective did not trigger the applicability of *Giglio*. This, however, is error under *United States v. Antone*, 603 F.2d 566, 569 (5th Cir.1979) and cases cited therein. A prom-

Q: Okay. Now, were you attempting to get your escape charges altered or at least worked out, were you expecting your testimony to be helpful in that?

A: I wasn't worrying about the escape charge. I wouldn't have needed this for that charge, there wasn't no escape charge.

Q: Those charges are still pending against you, aren't they?

A: Yeah, the charge is pending against me, but I ain't been before no Grand Jury or nothing like that, not yet.

Trial Transcript at 882.

<sup>17</sup> At the habeas hearing the following transpired:

The Court: Mr. Evans, let me ask you a question. At the time that you testified in Mr. McCleskey's trial, had you been promised anything in exchange for your testimony?

The Witness: No, I wasn't. I wasn't promised nothing about—I wasn't promised nothing by the D.A. But the Detective told me that he would—he said he was going to do it himself, speak a word for me. That was what the Detective told me.

By Mr. Stroup:

Q: The Detective told you that he would speak a word for you?

A: Yeah.

Q: That was Detective Dorsey?

A: Yeah.

Habeas Transcript at 122.

ise, made prior to a witness's testimony, that the investigating detective will speak favorably to federal authorities concerning pending federal charges is within the scope of *Giglio* because it is the sort of promise of favorable treatment which could induce a witness to testify falsely on behalf of the government. Such a promise of favorable treatment could affect the credibility of the witness in the eyes of the jury. As the court observed in *United States v. Barham*, 595 F.2d 231 (5th Cir.1979), *cert. denied*, 450 U.S. 1002, 101 S.Ct. 1711, 68 L.Ed.2d 205, the defendant is "entitled to a jury that, before deciding which story to credit, was truthfully apprised of any possible interest of any Government witness in testifying falsely." *Id.* at 243 (emphasis in original).

A finding that the prosecution has given the witness an undisclosed promise of favorable treatment does not necessarily warrant a new trial, however. As the Court observed in *Giglio*:

We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . ." *United States v. Keogh*, 391 F.2d 138, 148 (C.A. 2 1968). A finding of materiality of the evidence is required under *Brady, supra*, at 87. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." 405 U.S. at 154, 92 S.Ct. at 766.

In *United States v. Anderson*, 574 F.2d 1347 (5th Cir. 1978), the court elaborated upon the standard of review to be applied in cases involving suppression of evidence impeaching a prosecution witness:

The reviewing court must focus on the impact on the jury. A new trial is necessary when there is any reasonable likelihood that disclosure of the truth would have affected the judgment of the jury, that is, when



there is a reasonable likelihood its verdict might have been different. We must assess both the weight of the independent evidence of guilt and the importance of the witness' testimony, which credibility affects. *Id.* at 1356.

In other cases the court has examined the extent to which other impeaching evidence was presented to the jury to determine whether or not the suppressed information would have made a difference. *E.g.*, *United States v. Antone*, 603 F.2d 566 (5th Cir.1979).

In the present case the testimony of Evans was damaging to petitioner in several respects. First, he alone of all the witnesses for the prosecution testified that McCleskey had been wearing makeup on the day of the robbery. Such testimony obviously helped the jury resolve the contradictions between the descriptions given by witnesses after the crime and their in-court identifications of petitioner. Second, Evans was the only witness, other than the codefendant, Ben Wright, to testify that McCleskey had admitted to shooting Officer Schlatt. No murder weapon was ever recovered. No one saw the shooting. Aside from the damaging testimony of Wright and Evans that McCleskey had admitted the shooting, the evidence that McCleskey was the triggerman was entirely circumstantial. Finally, Evans' testimony was by far the most damaging testimony on the issue of malice.<sup>18</sup>

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<sup>18</sup> In his closing argument to the jury the prosecutor developed the malice argument:

He (McCleskey) could have gotten out of that back door just like the other three did, but he chose not to do that, he chose to go the other way, and just like Offie Evans says, it doesn't make any difference if there had been a dozen policemen come in there, he was going to shoot his way out. He didn't have to do that, he could have run out the side entrance, he could have given up, he could have concealed himself like he said he tried to do under one of the couches and just hid there. He could have done that and let them find him, here I am, peekaboo.

In reviewing all of the evidence presented at trial, this court cannot conclude that had the jury known of the promise made by Detective Dorsey to Offie Evans, that there is any reasonable likelihood that the jury would have reached a different verdict on the charges of armed robbery. Evans's testimony was merely cumulative of substantial other testimony that McCleskey was present at the Dixie Furniture Store robbery. However, given the circumstantial nature of the evidence that McCleskey was the triggerman who killed Officer Schlatt and the damaging nature of Evans's testimony as to this issue and the issue of malice, the court does find that the jury may reasonably have reached a different verdict on the charge of malice murder had the promise of favorable treatment been disclosed. The court's conclusion in this respect is bolstered by the fact that the trial judge, in charging the jury as to murder, instructed the jury that they could find the defendant guilty of either malice murder or felony murder. After approximately two hours of deliberation, the jury asked the court for further instructions on the definition of malice. Given the highly damaging nature of Evans's testimony on the issue of malice, there is a reasonable likelihood that disclosure of the promise of favorable treatment to Evans would have affected the judgment of the jury on this issue.<sup>19</sup>

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He deliberately killed that officer on purpose. I can guess what his purpose was, I am sure you can guess what it was, too. He is going to be a big man and kill a police officer and get away with it. That is malice.

Trial Transcript at 974-75.

<sup>19</sup> Although petitioner has not made this argument, the court notes in passing that Evans' testimony at trial regarding the circumstances of his escape varies markedly from the facts appearing in the records of federal prison authorities. For example, the records show that Evans had been using cocaine and opium immediately prior to and during his absence from the halfway house. Petitioner's Exhibit D, filed June 25, 1982. Also, prison records show that upon being captured Evans told authorities he had been in Florida working undercover in a drug investigation. Petitioner's

As the Fifth Circuit observed in *United States v. Barham*, 595 F.2d 231 (5th Cir.), *cert. denied*, 450 U.S. 1002, 101 S.Ct. 1711, 68 L.Ed.2d 205 (1981), another case involving circumstantial evidence bolstered by the testimony of a witness to whom an undisclosed promise of favorable treatment had been given:

There is no doubt that the evidence in this case was sufficient to support a verdict of guilty. But the fact that we would sustain a conviction untainted by the false evidence is not the question. After all, we are not the body which, under the Constitution, is given the responsibility of deciding guilt or innocence. The jury is that body, and, again under the Constitution, the defendant is entitled to a jury that is not laboring under a Government-sanctioned false impression of material evidence when it decides the question of guilt or innocence with all its ramifications.

We reiterate that credibility was especially important in this case in which two sets of witnesses—all alleged participants in one or more stages of a criminal enterprise—presented irreconcilable stories. Barham was entitled to a jury that, before deciding which story to credit, was truthfully apprised of any possible interest of *any* Government witness in testifying falsely. Knowledge of the Government's promises to Joey Shaver and Diane and Jerry Beech would have given the jury a concrete reason to believe that those three witnesses might have fabricated testimony

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Exhibit E, filed June 25, 1982. These facts, available to the prosecutorial team but unknown to the defense, contradict Evans' belittling of his escape. *See* Note 1, *supra*. The prosecution allowed Evans' false testimony to go uncorrected, and the jury obtained a materially false impression of his credibility. Under these circumstances the good faith or bad faith of the prosecution is irrelevant. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

in order to avoid prosecution themselves or minimize the adverse consequences of prosecution. . . . And the subsequent failure of the Government to correct the false impression given by Shaver and the Beeches shielded from jury consideration yet another, more persuasive reason to doubt their testimony—the very fact that they had attempted to give the jury a false impression concerning promises from the Government. In this case, in which credibility weighed so heavily in the balance, we cannot conclude that the jury, had it been given a specific reason to discredit the testimony of these key Government witnesses, would still have found that the Government's case and Barham's guilt had been established beyond a reasonable doubt. *Id.* at 242-43 (emphasis in original).

Because disclosure of the promise of favorable treatment and correction of the other falsehoods in Evans' testimony could reasonably have affected the jury's verdict on the charge of malice murder, petitioner's conviction and sentence on the charge are unconstitutional.<sup>20</sup> The writ of habeas corpus must therefore issue.

#### IV. CLAIM "C"—THE *SANDSTROM* CLAIM.

Petitioner claims that the trial court's instructions to the jury deprived him of due process because they unconstitutionally relieved the prosecution of its burden of proving beyond a reasonable doubt each and every essential element of the crimes for which defendant was convicted. Specifically, petitioner objects to that portion of the trial court's charge which stated:

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<sup>20</sup> Nothing the court says in this part of the opinion is meant to imply that petitioner's confinement for consecutive life sentences on his armed robbery convictions is unconstitutional. The court holds only that the conviction and sentence for murder are unconstitutional.

One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.<sup>21</sup> Trial Transcript at 996.

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<sup>21</sup> The relevant portions of the trial court's jury instructions are set forth below. The portions to which petitioner objects are underlined.

Now, the defendant enters upon the trial of this case, of all three charges set forth in the indictment, with the presumption of innocence in his behalf, and that presumption remains with him throughout the trial of the case unless and until the State introduces evidence proving the defendant's guilt of one or more or all of the charges beyond a reasonable doubt.

The burden rests upon the state to prove the case by proving the material allegations of each count to your satisfaction and beyond a reasonable doubt. In determining whether or not the state has carried that burden you would consider all the evidence that has been introduced here before you during the trial of this case.

Now, in every criminal prosecution, ladies and gentlemen, criminal intent is a necessary and material ingredient thereof. To put it differently, a criminal intent is a material and necessary ingredient in any criminal prosecution.

I will now try to explain what the law means by criminal intent by reading you two sections of the criminal code dealing with intent, and I will tell you how the last section applies to you, the jury.

*One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.*

I charge you, however, that a person will not be presumed to act with criminal intention, but the second code section says that the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive and all other



It is now well established that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Jury instructions which relieve the prosecution of this burden or which shift to the accused

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circumstances connected with the act for which the accused is prosecuted.

Now, that second code section I have read you as the term the trier of facts. In this case, ladies and gentlemen, you are the trier of facts, and therefore it is for you, the jury, to determine the question of facts solely from your determination as to whether there was a criminal intention on the part of the defendant, considering the facts and circumstances as disclosed by the evidence and deductions which might reasonably be drawn from those facts and circumstances.

Now, the offense charged in Count One of the indictment is murder, and I will charge you what the law says about murder.

I charge you that a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. That is the language of the law, ladies and gentlemen.

I charge you that legal malice is not necessarily ill-will or hatred. It is the intention to unlawfully kill a human being without justification or mitigation, which intention, however, must exist at the time of the killing as alleged, but it is not necessary for that intention to have existed for any length of time before the killing.

In legal contemplation a man may form the intention to kill a human being, do the killing instantly thereafter, and regret the deed as soon as it is done. In other words, murder is the intentional killing of a human being without justification or mitigation.

the burden of persuasion on one or more elements of the crime are unconstitutional. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

In analyzing a *Sandstrom* claim the court must first examine the crime for which the petitioner has been convicted and then examine the complained-of charge to determine whether the charge unconstitutionally shifted the burden of proof on any essential element of the crime. See *Lamb v. Jernigan*, 683 F.2d 1332, 1335-36 (11th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983). If the reviewing court determines that a reasonable juror would have understood the instruction either to relieve prosecution of its burden of proof on an essential element of the crime or shift to the defendant the burden of persuasion on that element the conviction must be set aside unless the reviewing court can state that the error was harmless beyond a reasonable doubt. *Lamb v. Jernigan*, *supra*; *Mason v. Balkcom*, 669 F.2d 222 (5th Cir. Unit B 1982), *cert. denied*, — U.S. —, 103 S.Ct. 1260, 75 L.Ed.2d 487 (1983).<sup>22</sup>

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<sup>22</sup> Whether a *Sandstrom* error can be held to be harmless remains an open question at this time. The Supreme Court expressly left open in *Sandstrom* the question of whether a burden-shifting jury instruction could ever be considered harmless. 442 U.S. at 526-27, 99 S.Ct. at 2460-61. The courts of this circuit have held that where the *Sandstrom* error is harmless beyond a reasonable doubt a reversal of the conviction is not warranted. See, e.g., *Lamb v. Jernigan*, 683 F.2d 1332, 1342-43 (11th Cir. 1982). In *Connecticut v. Johnson*, — U.S. —, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983), the Supreme Court granted certiorari to resolve the question of whether a *Sandstrom* error could ever be considered harmless. Four Justices specifically held that the test of harmlessness employed by this circuit—whether the evidence of guilt was so overwhelming that the erroneous instruction could not have contributed to the jury's verdict—was inappropriate. *Id.* 103 S.Ct. at 977. However, an equal number of justices dissented from this holding. *Id.* at 979 (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, J.J., dissenting). The tie-breaking vote was cast by

Petitioner was convicted of armed robbery and malice murder. The offense of armed robbery under Georgia law contains three elements: (1) A taking of property from the person or the immediate presence of a person, (2) by use of an offensive weapon, (3) with intent to commit theft.<sup>23</sup> The offense of murder also contains three essential elements: (1) A homicide; (2) malice aforethought; and (3) unlawfulness.<sup>24</sup> See *Lamb v. Jernigan*, *supra*; *Holloway v. McElroy*, 632 F.2d 605, 628 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028, 101 S.Ct. 3019, 69 L.Ed.2d 398 (1981). The malice element, which distinguishes murder from the lesser offense of voluntary manslaughter, means simply the intent to kill in the absence of provocation. In *Lamb v. Jernigan* the court concluded that "malice, including both the intent component and the

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Justice Stevens who concurred in the judgment on jurisdictional grounds. *Id.* at 978 (Stevens, J., concurring in the judgment).

Because a majority of the Supreme Court had not declared the harmless error standard employed in this circuit to be erroneous, the Eleventh Circuit has continued to hold that *Sandstrom* errors may be analyzed for harmlessness. See *Spencer v. Zant*, 715 F.2d 1562 (11th Cir. 1983).

<sup>23</sup> Georgia Code Ann. § 26-1902 (now codified at O.C.G.A. § 16-8-41) provides in pertinent part:

(a) A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon.

<sup>24</sup> Georgia Code Ann. § 26-1101 (now codified at O.C.G.A. § 16-5-1) defines the offense of murder as follows:

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

lack of provocation or justification, is an essential element of murder under Ga.Code Ann. § 26-1101(a) that *Mullaney* and its progeny require the State to prove beyond a reasonable doubt." 683 F.2d at 1337. Since the intent to commit theft is an essential element of the offense of armed robbery, the State must also prove this element beyond a reasonable doubt.

In analyzing the jury instructions challenged in the present case to determine whether they unconstitutionally shift the burden of proof on the element of intent, the court has searched for prior decisions in this circuit analyzing similar language. These decisions, however, provide little guidance for they reach apparently opposite results on virtually identical language. In *Sandstrom* the Supreme Court invalidated a charge which stated that "[t]he law presumes that a person intends the ordinary consequences of his acts," 442 U.S. at 513, 99 S.Ct. at 2453. The Court held that the jury could have construed this instruction as either creating a conclusive presumption of intent once certain subsidiary facts had been found or shifting to the defendant the burden of persuasion on the element of intent. The Court held both such effects unconstitutional. Like the instruction in *Sandstrom*, the instruction at issue in the present case stated that "the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted." This presumption would appear on its face to shift the burden of persuasion to the defendant. It does not contain the permissive language (intent "may be presumed when it would be the natural and necessary consequence of the particular acts.") which the *Lamb* court ruled created only a permissive inference rather than a mandatory presumption. Rather, the instruction at issue here states that a person is presumed to intend the natural and probable consequences of his acts. On

its face this instruction directs the jury to presume intent unless the defendant rebuts it. This would appear to be the sort of burden-shifting instruction condemned by *Sandstrom*. This conclusion is supported by *Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983) which held that language virtually identical to that involved in the present case<sup>25</sup> violated *Sandstrom*. In that case the court declared:

This is a mandatory rebuttable presumption, as described in *Sandstrom*, since a reasonable juror could conclude that on finding the basic facts (sound mind and discretion) he must find the ultimate fact (intent for the natural consequences of an act to occur) unless the defendant has proven the contrary by an undefined quantum of proof which may be more than "some" evidence. 720 F.2d at 1210.

However, in *Tucker v. Francis*, 723 F.2d 1504 (11th Cir. 1984) another panel of the Eleventh Circuit, including the author of the *Franklin* opinion, reviewed language identical to that in *Franklin* and concluded that it created no more than a permissive inference and did not violate *Sandstrom*. The court in *Tucker* relied upon the fact that the trial judge instructed the jury in other parts of his charge that criminal intent was an essential element of the crime and was a fact to be determined by the jury. The court also focused on the fact that the charge also stated that "a person will not be presumed to act with criminal intention, but the trier of fact, that is you the jury, may find such intention upon considera-

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<sup>25</sup> In *Franklin* the trial court charged the jury that:

[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.

*Franklin v. Francis*, 720 F.2d at 1210



tion of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted." *Tucker, supra*, at 1517. Examining the objectionable language in the context of the entire instruction under *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973), the court concluded that the instruction would not unconstitutionally mislead the jury as to the prosecution's burden of proof. *Tucker, supra*, at 1517. The problem with the reasoning is that the exact same instructions were contained in the charge given to the jury in *Franklin v. Francis*. See *Franklin v. Francis*, 720 F.2d at 1208 n. 2. This court can find no principled way of distinguishing between the charges at issue in *Franklin* and in *Tucker* and can discern no reason why the charge in *Franklin* would create a mandatory rebuttable presumption while the charge in *Tucker* could create only a permissive inference. The *Tucker* court did not explain this inconsistency and in fact did not even mention *Franklin*.

The charge at issue in the present case is virtually identical to those involved in *Franklin* and in *Tucker*. This court is bound to follow *Tucker v. Francis*, which is the latest expression of opinion on this subject by this circuit. The court holds that the instruction complained of in this case, taken in the context of the entire charge to the jury, created only a permissive inference that the jury could find intent based upon all the facts and circumstances of the case and thus did not violate *Sandstrom*. *Tucker v. Francis, supra*.

Having held that the instruction was not unconstitutional under *Sandstrom*, there is no need to examine the issue of harmlessness. However, the court expressly finds that even if the challenged instructions violated *Sandstrom*, the error was harmless beyond a reasonable doubt. The jury had overwhelming evidence that petitioner was present at the robbery and that he was the only one of the robbers in the part of the store from which the shots were fired. The jury also had evi-

dence that he alone of the robbers was carrying the type of weapon that killed Officer Schlatt. Finally, the jury had the testimony of Ben Wright and Offie Evans that McCleskey had not only admitted killing Officer Schlatt but had even boasted of his act. Looking at the totality of the evidence presented and laying aside questions of credibility which are the proper province of the jury, this court cannot conclude that there is any reasonable likelihood that the intent instruction, even if erroneous, contributed to the jury's decision to convict petitioner of malice murder and armed robbery. Petitioner's *Sandstrom* claim is, therefore, without merit.

#### V. CLAIM "L"—PROSECUTORIAL MISCONDUCT AT THE SENTENCING PHASE.

In this claim petitioner argues that the Assistant District Attorney improperly referred to the appellate process during his arguments to the jury at the sentencing phase of petitioner's trial.<sup>26</sup> References to the

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<sup>26</sup> The relevant portion of the prosecutor's argument to the jury in favor of the death penalty is set forth below:

Now, what should you consider as you are deliberating the second time here, and I don't know what you are going to consider.

I would ask you, however, to consider several things. Have you observed any remorse being exhibited during this trial by Mr. McCleskey? Have you observed any remorse exhibited while he was testifying?

Have you observed any repentance by Mr. McCleskey, either visually as you look at him now or during the trial or during the time that he testified? Has he exhibited to you any sorrow, both visually or during the time that he was testifying?

Have you seen any tears in his eyes for this act that he has done?

*I would also ask you to consider the prior convictions that you have had with you in the jury room, and particularly the one where he got three convictions. I believe if you look at those papers carefully you are going to find, I think, on one of those he got three life sentences to begin with, and then there is a cover sheet where apparently that was reduced to what,*

appellate process are not *per se* unconstitutional unless on the record as a whole it can be said that it rendered

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*eighteen years or fifteen years or something, which means of course, he went through the appellate process and somehow got it reduced.*

Now, I ask you to consider that in conjunction with the life that he has set for himself. You know, I haven't set his goals, you haven't set his goals, he set his own goals, and here is a man that served considerable periods of time in prison for armed robbery, just like Ben Wright said, you know, that is his profession and he gets in safely, takes care of the victims, although he may threaten them, and gets out safely, that is what he considers doing a good job, but of course you may not agree with him, but that is job safety.

I don't know what the Health, Education and Welfare or whatever organization it is that checks on job safety would say, but that is what Mr. Ben Wright considers his responsibility.

Now, apparently Mr. McCleskey does not consider that his responsibility, so consider that. The life that he has set for himself, the direction he has set his sails, and thinking down the road, are we going to have to have another trial sometime for another peace officer, another corrections officer, or some innocent bystander who happens to walk into a store, or some innocent person who happens to be working in the store who makes the wrong move, who makes the wrong turn, that makes the wrong gesture, that moves suddenly and ends up with a bullet in their head?

This has not been a pleasant task for me, and I am sure it hasn't been a pleasant task for you. I would have preferred that some of the other Assistants downstairs be trying this case, I would prefer some of the others be right here now, instead of me, and I figure a lot of you are figuring why did I get on this jury, why not some of the other jurors, let them make the decision.

I don't know why you are here, but you are here and I have to be here. It has been unpleasant for me, but that is my duty. I have tried to do it honorably and I have tried to do it with justice. I have no personal animosity toward Mr. McCleskey, I have no words with him, I don't intend to have any words with him, but I intend to follow what I consider to be my duty, my honor and justice in this case, and I ask you to do the same thing, that you sentence him to die, and that you find aggravating circumstances, both of them, in this case.

the entire trial fundamentally unfair. *McCorquodale v. Balkcom*, 705 F.2d 1553, 1556 (11th Cir. 1983); *Corn v. Zant*, 708 F.2d 549, 557 (11th Cir.1983).

The prosecutor's arguments in this case did not intimate to the jury that a death sentence could be reviewed or set aside on appeal. Rather, the prosecutor's argument referred to petitioner's prior criminal record and the sentences he had received. The court cannot find that such arguments had the effect of diminishing the jury's sense of responsibility for its deliberations on petitioner's sentence. Insofar as petitioner claims that the prosecutor's arguments were impermissible because they had such an effect, the claim is without merit.<sup>27</sup>

#### VI. CLAIM "B"—TRIAL COURT'S REFUSAL TO PROVIDE PETITIONER WITH FUNDS TO RETAIN HIS OWN EXPERT WITNESS.

Petitioner contends that the trial court's refusal to grant funds for the employment of a ballistics expert to impeach the testimony of Kelley Fite, the State's ballistics expert, denied him due process. This claim is clearly without merit for the reasons provided in *Moore v. Zant*, 722 F.2d 640 (11th Cir.1983).

Under Georgia law the appointment of an expert in a case such as this ordinarily lies within the dis-

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<sup>27</sup> Although the point has not been argued by either side and is thus not properly before the court, the prosecutor's arguments may have been impermissible on the grounds that they encouraged the jury to take into account the possibility that petitioner would kill again if given a life sentence. Such "future victims" arguments have recently been condemned by the Eleventh Circuit on the grounds that they encourage the jury to impose a sentence of death for improper or irrelevant reasons. See *Tucker v. Francis*, 723 F.2d 1504 (11th Cir. 1984); *Brooks v. Francis*, 716 F.2d 780 (11th Cir. 1983); *Hance v. Zant*, 696 F.2d 940 (11th Cir. 1983). The court makes no intimation about the merits of such an argument and makes mention of it only for the purpose of pointing out that it has not been raised by fully competent counsel.

cretion of the trial court. See *Whitaker v. State*, 246 Ga. 163, 269 S.E.2d 436 (1980). In this case the State presented an expert witness to present ballistics evidence that the bullet which killed Officer Schlatt was probably fired from a gun matching the description of the gun petitioner had stolen in an earlier robbery and which matched the description of the gun several witnesses testified the petitioner was carrying on the day of the robbery at the Dixie Furniture Company. Petitioner had ample opportunity to examine the evidence prior to trial and to subject the expert to a thorough cross-examination. Nothing in the record indicates that the expert was biased or incompetent. This court cannot conclude therefore that the trial court abused its discretion in denying petitioner funds for an additional ballistics expert.

VII. CLAIM "D"—TRIAL COURT'S INSTRUCTIONS REGARDING USE OF EVIDENCE OF OTHER CRIMES AT GUILT STAGE OF PETITIONER'S TRIAL.

Petitioner claims that the trial court's instructions regarding the purposes for which the jury could examine evidence that petitioner had participated in other robberies for which he had not been indicted was overly broad and diminished the reliability of the jury's guilt determination.

During the trial the prosecution introduced evidence that petitioner had participated in armed robberies of the Red Dot Grocery Store and the Red Dot Fruit Stand. At that time the trial judge cautioned the jury that the evidence was admitted for the limited purpose of "aiding in the identification and illustrating the state of mind, plan, motive, intent and scheme of the accused, if in fact it does to the jury so do that." The evidence tended to establish that petitioner had participated in earlier armed robberies employing the same *modus operandi* and that in one of these robberies he had stolen



what was alleged to have been the weapon that killed Officer Schlatt. Such evidence is admissible under Georgia law. See *Hamilton v. State*, 239 Ga. 72, 235 S.E.2d 515 (1977). Petitioner objects that the trial court's instructions regarding the use of this evidence were overbroad because "(a) the prosecution itself had offered the evidence of other transactions for the purpose of showing the identity of the accused rather than to show intent or state of mind, and (b) it is irrational to instruct that evidence of an accused's participation in another transaction where a murder did not occur is probative of the accused's intent to commit malice murder." Petitioner's Memorandum of Law in Support of Issuance of the Writ at 10-11. Both of these contentions are without merit. First, the court sees nothing in the court's instructions to support petitioner's contention that the jury was allowed to find intent to commit malice murder from the evidence of the prior crimes. Petitioner was charged with armed robbery and murder. The evidence of the Red Dot Grocery Store robbery was admissible for the purpose of showing that petitioner had stolen the murder weapon. The evidence of the other armed robberies was admissible for the purpose of showing a common scheme or plan on the armed robbery count. Also, the evidence of the Red Dot Fruit Stand robbery was admitted for impeachment purposes only after the petitioner took the stand in his own defense. The court has read the trial court's instructions and cannot conclude that the instructions were overbroad or denied petitioner a fair trial. See *Spencer v. Texas*, 385 U.S. 554, 560-61, 87 S.Ct. 648, 651-52, 17 L.Ed.2d 606 (1967).<sup>28</sup>

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<sup>28</sup> The relevant portion of the trial judge's instructions to the jury were as follows:

Now, ladies and gentlemen, there was certain evidence that was introduced here, and I told you it was introduced for a limited purpose, and I will repeat the cautionary charge I gave you at that time.

I told you that in the prosecution of a particular crime, evidence which in any manner tends to show that the accused has com-

VIII. CLAIM "E"—EVIDENCE OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES PRESENTED AT PENALTY STAGE OF PETITIONER'S TRIAL.

Petitioner contends that the trial court erred by giving the jury complete, unlimited discretion to use any of the evidence presented at the trial during its deliberations regarding imposition of the death penalty. Petitioner's claim is without merit. The trial judge specifically instructed the jury that it could not impose the death penalty unless it found at least one statutory aggravating circumstance.<sup>29</sup> He also instructed the jury that if it

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mitted another transaction, wholly distinct, independent and separate from that for which he is on trial, even though it may show a transaction of the same nature, with similar methods and in the same localities, it is admitted into evidence for the limited purpose of aiding in identification and illustrating the state of mind, plan, motive, intent and scheme of the accused, if, in fact, it does to the jury so do that.

Now, whether or not this defendant was involved in such similar transaction or transactions is a matter for you to determine. Furthermore, if you conclude that the defendant was involved in this transaction or these transactions, you should consider it solely with reference to the mental state of the defendant insofar as it is applicable to the charges set forth in the indictment, and the court in charging you this principle of law in no way intimates whether such transaction or transactions, if any, tend to illustrate the state of mind or intent of the defendant or aids in identification, that is a matter for you to determine.

Transcript at 992-93.

<sup>29</sup> The relevant portion of the judge's sentencing charge is printed below. The challenged portion is underlined.

I charge you that in arriving at your determination you must first determine whether at the time the crime was committed either of the following aggravating circumstances was present and existed beyond a reasonable doubt; one, that the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit, armed robbery; and two, the offense of murder was com-

found one or more statutory aggravating circumstances it could also consider any other mitigating or aggravating circumstances in determining whether or not the death penalty should be imposed.

Georgia's capital sentencing procedure has been declared constitutional by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Just recently the Supreme Court examined an argument similar to the one petitioner makes here in *Zant v. Stephens*, — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). In that case the Court dealt with the argument that allowing the jury to consider any aggravating circumstances

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mitted against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

Now, if you find one or both of these aggravating circumstances existed beyond a reasonable doubt, upon consideration of the offense of murder, then you would be authorized to consider imposing a sentence of death relative to that offense.

If you do not find beyond a reasonable doubt that one of the two of these aggravating circumstances existed with reference to the offense of murder, then you would not be authorized to consider the penalty of death, and in that event the penalty imposed would be imprisonment for life as provided by law.

*In arriving at your determination of which penalty shall be imposed, you are authorized to consider all of the evidence received here in court, presented by the State and the defendant throughout the trial before you.*

You should consider the facts and circumstances in mitigation. Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.

Now, it is not mandatory that you impose the death penalty even if you should find one of the aggravating circumstances does exist or did exist. You could only impose the death penalty if you do find one of the two statutory aggravating circumstances I have submitted to you, but if you find one to exist or both of them to exist, it is not mandatory upon you to impose the death penalty.

once a statutory aggravating circumstance had been found allowed the jury unbridled discretion in determining whether or not to impose the death penalty on a certain class of defendants. The Court stated:

Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: They circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime. *Zant v. Stephens*, — U.S. —, 103 S.Ct. at 2743-44 [77 L.Ed.2d 235] (emphasis in original).

The court specifically approved in *Zant v. Stephens* consideration by the jury of non-statutory aggravating circumstances, provided that such evidence is not "constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion or political affiliation of the defendant." *Id.* 103 S.Ct. at 2747.

The sentencing jury in this case found two statutory aggravating circumstances: (1) That the offense of murder had been committed while McCleskey was engaged in the commission of another capital felony; and (2) that the offense of murder was committed against a peace officer while engaged in the performance of his official duties. "The trial judge could therefore properly admit any 'additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior conviction,' . . . provided that the evidence bore on 'defendant's prior record, or circumstances of his offense,'" *Moore v. Zant*, 722 F.2d 640 at 644 (11th Cir.1983) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 n.12, 98 S.Ct. 2954, n.12, 57 L.Ed.2d 973 (1978)). For the reasons

stated in *Zant v. Stephens*, *supra*, and *Moore v. Zant*, *supra*, petitioner's claim is without merit.

IX. CLAIM "F"—WHETHER THE ADMISSION AT PETITIONER'S TRIAL OF EVIDENCE CONCERNING PRIOR CRIMES AND CONVICTIONS VIOLATED PETITIONER'S DUE PROCESS RIGHTS.

Petitioner contends that the admission of evidence concerning two prior armed robberies for which he had not been indicted and the admission of details of other prior armed robberies for which he had been convicted violated his due process rights. This court has already concluded in Part VII, *supra*, that the evidence that petitioner participated in prior armed robberies was properly admitted to show petitioner's scheme, motive, intent or design and that the trial judge's instructions properly limited the use of this evidence. See also *McCleskey v. State*, 245 Ga. 108, 114, 263 S.E.2d 146 (1980). The evidence to which petitioner objects most strongly in Claim "F" concerns details of prior armed robberies for which petitioner had been convicted. When petitioner took the stand in his own defense, he admitted on direct examination that he had previously been convicted of armed robbery. He admitted to being guilty of those crimes, gave the dates of the convictions and the sentences he had received. On cross-examination the Assistant District Attorney asked petitioner a number of questions concerning the details of those robberies.<sup>30</sup> Petitioner contends that this questioning

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<sup>30</sup> A portion of the cross-examination was as follows:

Q: Are you saying you were guilty or you were not guilty?

A: Well, I was guilty on this.

Q: Three counts of armed robbery?

A: Pardon me?

Q: You were guilty for the three counts of armed robbery?

A: Yes sir.

[continued]



concerning the details of crimes to which petitioner had admitted guilt exceeded the bounds of what was permis-

<sup>30</sup> [continued]

Q: How about the other two that you pled guilty to, were you guilty of those?

A: I was guilty on the Cobb County, but the others I was not guilty of, but I pleaded guilty to them anyway, because like I say, I didn't see no reason to go through a long process of fighting them, and I already had a large sentence.

Q: So you are guilty for the Douglas County armed robberies and the Cobb County robbery, but not the Fulton County robbery?

A: I pleaded guilty to it.

Q: To the Fulton County?

A: Sure.

Q: But are you guilty of that robbery?

A: I wasn't guilty of it, but I pleaded guilty to it.

Q: But you were guilty in all of the robberies in Cobb County and Douglas County, is that correct?

A: I have stated I am guilty for them, but for the ones in Fulton County, no, I wasn't guilty of it. I pleaded guilty to it because I didn't see no harm it could do to me.

Q: Now, one of those armed robberies in Douglas County, do you recall where that might have been?

A: You mean place?

Q: Yes, sir.

A: I know it was a loan company.

Q: Kennesaw Finance Company on Broad Street, is that about correct?

A: That sounds familiar.

Q: And did you go into that place of business at approximately closing time?

A: I would say yes.

Q: Did you tie the manager and the—the managers up?

A: No, I didn't do that.

Q: Did somebody tie them up?

A: Yes, sir.

Q: Did they curse those people?

A: Did they curse them?

[continued]

sible for impeachment purposes, was irrelevant to the crimes for which he was being tried, and served to prej-

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<sup>30</sup> [continued]

Q: Yes, sir.

A: Not to my recollection.

Q: Did they threaten to kill those people?

A: Not to my recollection.

Q: Did somebody else threaten to kill them?

A: I don't remember anybody making any threats. I vaguely remember the incident, but I don't remember any threats being issued out.

Q: Now, the robbery in Cobb County, do you remember where that might have been.

A: Yes, sir, that was at Kennesaw Finance, I believe.

Q: And do you remember what time of day that robbery took place?

A: If I am not mistaken, I think it was on the 23rd day of July.

Q: 1970?

A: Right.

Q: About 4:30 p.m.?

A: Yes, sir.

Q: Were you found inside the store on the floor with a .32 caliber revolver?

A: Yes, sir, they caught me red-handed, I couldn't deny it.

Q: And did you arrive there with an automobile parked around the corner?

A: I didn't have an automobile.

Q: Did that belong to Harold McHenry?

A: McHenry had the automobile.

Q: And was he with you in the robbery?

A: Yes, sir.

Q: And was ~~that~~ automobile parked around the corner with the motor running?

A: At that time I don't know exactly where it was parked because I didn't get out right there around the corner, I ~~got~~ out of the street from the place and he was supposed to pick us up right there, but unfortunately he didn't make it.

[continued]

udice the jury against him. The Supreme Court of Georgia has already declared that this evidence was properly admitted under the Georgia Rules of Evidence. Petitioner asks this court now to declare the Georgia rule allowing the admissibility of this evidence to be violative of the due process clause of the Fourteenth Amendment.

In *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the Supreme Court stated:

To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice of emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. *Id.* at 638, 100 S.Ct. at 2390.

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<sup>30</sup> [continued]

Q: You also have been convicted out in DeKalb County, haven't you?

A: Yes, sir, I entered a plea out there. All of those charges stem from 1970.

Q: What did you plead guilty to out in De-Kalb County?

A: Robbery charge.

Q: Armed robbery?

A: Yes, sir.

Q: And where was that at, sir?

A: I don't know—I don't remember exactly where the robbery was supposed to have took place, but I remember entering a guilty plea to it.

Q: Were you guilty of that?

A: No, sir, I wasn't guilty of it. Like I said, I had spent money on top of money trying to fight these cases and I didn't see any need to continue to fight cases and try to win them and I have already got a large sentence anyway.

Q: I believe the DeKalb County case was out at the Dixie Finance Company out in Lithonia, is that correct?

A: I don't really recollect. I do remember the charge coming out, but I don't recall exactly what place it was.

In *Beck* the Supreme Court struck down an Alabama statute which prohibited a trial judge from instructing the jury in a murder case that it could find the defendant guilty of a lesser-included offense. The Court ruled that this statute distorted the factfinding function of the jury. "In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id.* at 642, 100 S.Ct. at 2392.

In *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) the Supreme Court set aside a death sentence on the grounds that the state trial court had excluded certain hearsay testimony at the sentencing portion of petitioner's trial. In that case the Court stated:

Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 96, 99 S.Ct. at 2151.

It seems clear from these cases that a state procedural or evidentiary rule which might substantially diminish the reliability of the factfinding function of the jury in a capital case would violate the due process clause of the Fourteenth Amendment. The question, then, is whether or not the admissibility of the details of other crimes can be said to have had the effect of diminishing "the reliability of the guilt determination." Petitioner has cited several cases from this and other circuits which have held that the admission in a federal prosecution of details of prior crimes to which the defendant had admitted guilt was unfairly prejudicial and constituted reversible error. See, e.g., *United States v. Tumblin*, 551 F.2d 1001 (5th Cir.1977); *United States v. Harding*, 525 F.2d 84 (7th Cir.1975) ("The rule that it is error to in-

quire about the details of prior criminal conduct is so well established that such error is cognizable despite the absence of any objection by defense counsel."'). The point petitioner has overlooked is that prosecutions in federal court are governed by the Federal Rules of Evidence. Each of the cases petitioner has cited rely to a greater or lesser extent upon an interpretation of those rules. While the Federal Rules of Evidence embody a modern concept of fairness and due process, it is not for this court to say that they are the only embodiment of due process or the standard against which state rules of evidence must be judged. While the evidence presented at petitioner's trial would probably not have been admitted in a federal prosecution, this court cannot conclude that it was so seriously prejudicial that it undermined the reliability of the jury's guilt determination. Petitioner's Claim "F" is therefore without merit.

#### X. CLAIM "M"—THE SUGGESTIVE LINEUP.

In this claim petitioner contends that he was shown to at least three witnesses for the State in an illegal and highly suggestive display immediately prior to his trial without the knowledge, consent, or presence of defense counsel. The Supreme Court of Georgia thoroughly addressed this concern and found against petitioner. *McCleskey v. State*, 245 Ga. 108, 110-12, 263 S.E.2d 146 (1980). In its discussion the Supreme Court of Georgia stated:

The record shows that four witnesses immediately prior to the call of the case saw the appellant and four other persons sitting in the jury box guarded by deputy sheriffs. Each of these witnesses testified that they recognized the appellant as one of the robbers at the time they saw him seated in the jury box. There is no indication that the witnesses were asked to view the man seated in the jury box and see if they recognized anyone. No one pointed out the appellant



as the defendant in the case, rather it is apparent from the witnesses' testimony that each recognized the appellant from having viewed him at the scene of the respective robberies. Therefore, no illegal post-indictment lineup occurred. . . .

Appellant argues further that the four witnesses viewing him in the jury box as he awaited trial along with police identification procedures impermissibly tainted the witnesses' in-court identification of the appellant.

The threshold inquiry is whether the identification procedure was impermissibly suggestive. Only if it was, need the court consider the second question: Whether there was a substantial likelihood of irreparable misidentification. . .

The chance viewing of the appellant prior to trial as he sat with others was no more suggestive than seeing him in the hall as he and other defendants are being brought in for trial, or seeing him seated at the defense table as each witness comes in to testify. We conclude that the chance viewing of the appellant immediately prior to trial by four of the State's witnesses was not impermissibly suggestive. Also we find the identifications were not tainted by police identification procedures. 245 Ga. at 110, 263 S.E.2d 146.

Although the court found that the display was not impermissibly suggestive, the court went on to examine whether the in-court identifications were reliable and found that they were. This court finds no basis in the record or in the arguments presented by petitioner for concluding that the Suupreme Court of Georgia was in error. The court therefore finds that petitioner's Claim "M" is without merit.

XI. CLAIM "N"—WHETHER PETITIONER'S STATEMENT INTRODUCED AT TRIAL WAS FREELY AND VOLUNTARILY GIVEN AFTER A KNOWING WAIVER OF PETITIONER'S RIGHTS.

In this claim petitioner contends that the admission at trial of his statements given to the police was error because the statements were not freely and voluntarily given after a knowing waiver of rights. Before the statement was revealed to the jury the trial court held, outside of the presence of the jury, a *Jackson v. Denno* hearing. The testimony at this hearing revealed that at the time he was arrested petitioner denied any knowledge of the Dixie Furniture Store robbery. He was detained overnight in the Marietta Jail. The next morning when two Atlanta police officers arrived to transfer him to Atlanta they advised him of his full *Miranda* rights. He again denied any knowledge of the Dixie Furniture Store robbery. There was some dispute about what was said during the half-hour trip back to Atlanta. Petitioner claimed that the officers told him that his co-defendants had implicated him and that if he did not start talking they would throw him out of the car. The officers, of course, denied making any such threat but did admit that they told petitioner that the other defendants were "trying to stick it on" him. The officers testified that during the trip back, after being fully advised of his *Miranda* rights and not being subjected to any coercion or threats, petitioner admitted his full participation in the robbery but denied that he shot Officer Schlatt.

Immediately upon arrival at the Atlanta Police Department petitioner was taken to Detective Jowers. At that time petitioner told Jowers that he was ready to talk. Detective Jowers had petitioner execute a written waiver of counsel. This waiver included full *Miranda* warnings and a statement that no threats or promises had been made to induce petitioner's signature. Petitioner's state-

ment was then taken over the next several hours. During the first part of this session petitioner simply narrated a statement to a secretary who typed it. The secretary testified that petitioner was dissatisfied with the first draft of the statement and started another one. The first draft was thrown away.

After petitioner finished his narration Detective Jowers proceeded to ask him a number of questions about the crime. This questioning went on for some time off the record. Finally, a formal question and answer session was held on the record. These questions and answers were typed up by the secretary and signed by petitioner.

It is undisputed that the atmosphere in the room where the statement was being taken was unusually relaxed and congenial, considering the gravity of the crime of which petitioner was accused. The secretary who typed it testified that she had never seen the police officers treat a murder suspect with such warmth.<sup>31</sup>

After hearing all of the testimony and considering petitioner's argument that the police had engaged in a "Mutt and Jeff" routine,<sup>32</sup> the trial court ruled that the statement had been freely and voluntarily given after a knowing waiver of petitioner's *Miranda* rights. The jury was then returned and the statement and testimony were then introduced.

After having read the transcript of the proceedings this court cannot conclude that the trial judge erred in his finding that the statement was freely and voluntarily given. There was no error, therefore, in admitting the

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<sup>31</sup> The officers gave petitioner cigarettes, potato chips, and soft drinks during the interrogation. They also at one point discussed with him the attractiveness of a particular female officer.

<sup>32</sup> Such routines involve one group of officers acting hostile and threatening toward the defendant while another officer or group of officers seemingly befriends him and showers him with kindness. The rationale for such routines is that defendants often believe they have found a friend on the police force to whom they can tell their story.

statement in to evidence. Petitioner's Claim "N" is therefore without merit.

## XII. CLAIM "O"—EXCLUSION OF DEATH-SCRUPLED JURORS.

Petitioner claims that the exclusion of two prospective jurors because of their opposition to the death penalty violated his Sixth Amendment rights under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Both jurors indicated that they would not under any circumstances consider the death penalty.<sup>33</sup>

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<sup>33</sup> The examination of Miss Barbara J. Weston was as follows:

Q: Now, Miss Weston, are you conscientiously opposed to capital punishment?

A: Yes.

Q: Your opposition towards capital punishment, would that cause you to vote against it regardless of what the facts of the case might be?

A: Yes, I would say so, because of the doctrine of our church. We have a manual that we go by.

Q: Does your church doctrine oppose capital punishment?

A: Yes.

Q: So you would oppose the imposition of capital punishment regardless of what the facts would be?

A: Yes.

Q: You would not even consider that as one of the alternatives?

A: No, I wouldn't.

The Court: Mr. Turner, any questions you want to ask?

Mr. Turner: No questions from me.

The Court: Miss Weston, I will excuse you from this case.

Transcript 98-99.

The testimony of Emma T. Cason was as follows:

Q: Mrs. Cason, are you conscientiously opposed to capital punishment?

A: Yes.

[continued]

In *Witherspoon v. Illinois*, *supra*, the Supreme Court held that a person could not be sentenced to death by a jury from which persons who had moral reservations about the death penalty had been excluded, unless those persons had indicated that their opposition to the death penalty would prevent them from fulfilling their oaths as jurors to apply the law:

[N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. 391 U.S. at 522-23 n. 21, 88 S.Ct. at 1776-77 n. 21 (emphasis in original).

Since the two prospective jurors in this case indicated that they would not under any circumstances vote for the death

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<sup>33</sup> [continued]

Q: You are?

A: Yes.

Q: If you had two alternatives in a case as far as penalties go, that is, impose the death sentence or life penalty, could you at least consider the imposition of the death penalty?

A: I don't think so, no. I would have to say no.

Q: Under any circumstances you would not consider it?

A: No.

Mr. Parker: Thank you.

The Court: Any questions?

Mr. Turner: No questions.

The Court: Mrs. Cason, I will excuse you and let you return to the jury assembly room on the fourth floor.

Transcript 129-30.



penalty, the trial court committed no error in excluding them. *See Boulden v. Holman*, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969).

Petitioner's argument that the exclusion of death-scrupled jurors violated his right to be tried by a jury drawn from a representative cross section of his community has already been considered and rejected in this circuit. *Smith v. Balkcom*, 660 F.2d 573, 582-83 (5th Cir. Unit B 1981), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); *Spinkellink, v. Wainwright*, 578 F.2d 582, 593-99 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796, *reh'g denied*, 441 U.S. 937, 99 S.Ct. 2064, 60 L.Ed.2d 667 (1979). The Court in *Spinkellink* also rejected petitioner's claims that the exclusion of death-scrupled jurors resulted in a prosecution-prone jury or a jury that was incapable of maintaining "a link between contemporary community values and the penal system." 578 F.2d at 593-99. *See generally, Woodson v. North Carolina*, 428 U.S. 280, 295, 96 S.Ct. 2978, 2987, 49 L.Ed.2d 944 (1976).

Because the two prospective jurors indicated they would not consider the death penalty under any circumstances, they were properly excluded, and petitioner's Claim "O" is without merit.

### XIII. CLAIM "I"—PETITIONER'S CLAIM THAT THE DEATH PENALTY FAILS TO SERVE RATIONAL INTERESTS.

In his petition for the writ petitioner raised a claim that the death penalty fails to serve rational interests. Neither petitioner nor the State has briefed this issue, but the premise appears to be that the supposed deterrent value of the death penalty cannot be demonstrated; that executions set socially-sanctioned examples of violence; that public sentiment for retribution is not so strong as to justify use of the death penalty; and that no penal

purpose is served by execution which cannot be more effectively served by life imprisonment. Such arguments are more properly addressed to the political bodies. See *Furman v. Georgia*, 408 U.S. 238, 410, 92 S.Ct. 2726, 2814, 33 L.Ed.2d 346 (1972) (Blackmun, J., dissenting). Georgia's death penalty was declared constitutional in *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859 (1976). Petitioner's Claim "I" is therefore without merit.

#### XIV. CLAIM "Q"—PETITIONER'S BRADY CLAIM.

Petitioner contends that prior to trial defense counsel filed a *Brady* motion seeking, *inter alia*, statements he was alleged to have been made and that the State failed to produce the statement that was alleged to have been made to Offie Evans while in the Fulton County Jail. Petitioner contends that this failure to produce the statement prior to trial entitles him to a new trial.

*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) requires the prosecution to produce any evidence in its possession which would tend to be favorable or exculpatory to the defendant. However, *Brady* does not establish any right to pretrial discovery in a criminal case, but instead seeks only to insure the fairness of a defendant's trial and the reliability of the jury's determinations. *United States v. Beasley*, 576 F.2d 626 (5th Cir.1978), *cert. denied*, 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979). Thus, a defendant who seeks a new trial under *Brady* must meet three requirements to establish a successful claim: "(1) The prosecutor's suppression of the evidence, (2) the favorable character of the suppressed evidence for the defense, and (3) the materiality of the suppressed evidence." *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir.1980); *United States v. Preston*, 608 F.2d 626, 637 (5th Cir. 1979), *cert. denied*, 446 U.S. 940, 100 S.Ct. 2162, 64

L.Ed.2d 794 (1980) ; *United States v. Delk*, 586 F.2d 513, 518 (5th Cir.1978).

As a preliminary matter the court notes that the testimony of Offie Evans was hardly favorable to petitioner. Most of the testimony was highly damaging to petitioner. The only part of the testimony which could even remotely be regarded as favorable was Evans' testimony that McCleskey had told him that his face had been made up on the morning of the robbery by Mary Jenkins. This testimony contradicted Mary Jenkins' earlier testimony and thus had impeachment value against one of the State's witnesses. However, the very testimony that would have been impeached was testimony favorable to petitioner. Jenkins' testimony that petitioner had clear skin and no scar on the day of the crime contradicted the testimony of the store employees that the person in the front of the store had a rough, pimply complexion and a scar. Thus, Jenkins' testimony regarding petitioner's complexion on the morning of the crime helped create doubt in his favor. Impeachment of that testimony would have hurt rather than helped petitioner.

As a secondary matter, the court cannot see that the evidence in question was suppressed by the prosecution. While it was not produced prior to trial, it was produced during the trial. Thus, the jury was able to consider it in its deliberations. Petitioner has produced no cases to support the proposition that the failure of the prosecution to produce evidence prior to trial entitles him to a new trial where that evidence was produced during the trial. Since the evidence was before the jury, the court cannot find that the failure to disclose it prior to trial deprived petitioner of due process. Petitioner's Claim "Q" is clearly without merit.

#### XV. CLAIM "R"—SUFFICIENCY OF THE EVIDENCE

By this claim petitioner contends that the evidence introduced at trial was insufficient to prove beyond a reasonable doubt that he was the triggerman who shot Officer

Schlatt and that the shooting constituted malice murder. Petitioner does not argue that the evidence was insufficient to support his conviction for armed robbery.

As part of its review in this case, the Supreme Court found that "the evidence factually substantiates and supports the finding of the aggravating circumstances, the finding of guilt, and the sentence of death by a rational trier of fact beyond a reasonable doubt." *McCleskey v. State*, 245 Ga. 108, 115, 263 S.E.2d 146 (1980). In reviewing the sufficiency of the evidence, this court must view the evidence in a light most favorable to the State and should sustain the jury's verdict unless it finds that no rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Much of the evidence against petitioner was circumstantial. Witnesses placed him in the front of the store carrying a nickel-plated revolver matching the description of a .38 caliber Rossi which petitioner had stolen in an earlier armed robbery. The State's ballistics expert testified that the bullet which killed Officer Schlatt was probably fired from a .38 caliber Rossi. At least one witness testified that the shots were fired from a point closer to the front of the store than she was lying.

While the circumstantial evidence alone may not have been sufficient to support a verdict of malice murder, the State also introduced highly damaging testimony by one of the co-defendants, Ben Wright, and a fellow inmate at the Fulton County Jail, Offie Evans. Both of these witnesses testified that petitioner had admitted shooting Officer Schlatt. Evans testified that McCleskey told him that he would have shot his way out of the store even if there had been a dozen police officers. It is not this court's function to weigh the credibility of this testimony. That was for the jury to do. Viewing all the evidence in a light most favorable to the State, this court cannot find that no rational trier of fact could find petitioner guilty beyond a reasonable doubt of malice murder. *Jackson v.*

*Virginia, supra.* Petitioner's Claim "R" is therefore without merit.

#### XVI. CLAIM "P"—INEFFECTIVE ASSISTANCE OF COUNSEL.

By this claim petitioner contends that he was denied effective assistance of counsel in contravention of the Sixth and Fourteenth Amendments. He alleges that his counsel was ineffective for the following reasons: (1) That his attorney failed to investigate adequately the State's evidence and possible defenses prior to trial; (2) that during the trial counsel failed to raise certain objections or make certain motions; (3) that prior to the sentencing phase of petitioner's trial counsel failed to undertake an independent investigation into possible mitigating evidence and thus was unable to offer any mitigating evidence to the jury; and (4) that after the trial, counsel failed to review and correct the judge's sentence report.

It is well established in this circuit that a criminal defendant is entitled to effective assistance of counsel—that is, "counsel reasonably likely to render and rendering reasonably effective assistance." *See, e.g., Washington v. Strickland*, 693 F.2d 1243, 1250 (5th Cir. Unit B, 1982) (en banc), *cert. granted*, — U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983); *Gaines v. Hopper*, 575 F.2d 1147, 1149 (5th Cir. 1978); *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir.1974); *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir.1960), *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). However, the Constitution does not guarantee errorless counsel or counsel judged ineffective only by hindsight. *Herring v. Estelle, supra.* In order to be entitled to habeas corpus relief on a claim of ineffective assistance of counsel, petitioner must establish by a preponderance of the evidence: (1) That based upon the totality of circumstances in the entire record his counsel was not "reasonably likely to



render" and in fact did not render "reasonably effective assistance," and (2) that "ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense." *Washington v. Strickland*, 693 F.2d 1243, 1262 (5th Cir. Unit B 1982) (en banc). Even if petitioner meets this burden, habeas corpus relief may still be denied if the State can prove that "in the context of all the evidence . . . it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel." *Id.* With these standards in mind the court now addresses petitioner's particular contentions.

#### A. *Pretrial Investigation.*

It is beyond dispute that effective assistance of counsel requires some degree of pretrial investigation. "Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel." *Gaines v. Hopper*, 575 F.2d 1147, 1149-50 (5th Cir. 1978). In *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), the court discussed the extent of pretrial investigation required to constitute effective assistance of counsel. In that case the court stated:

The amount of pretrial investigation that is reasonable defies precise measurement. It will necessarily depend upon a variety of factors including the number of issues in the case, relative complexity of those issues, the strength of the government's case, and the overall strategy of trial counsel. . . . In making that determination, courts should not judge the reasonableness of counsel's efforts from the omniscient perspective of hindsight, but rather "from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances were known to him at the time in question." *Id.* at 1251 (quoting *Washington v. Watkins*, 655 F.2d 1346 at 1356 [5th Cir. Unit A 1981]).

The court went on to analyze a variety of cases falling into five general categories.<sup>34</sup> The category of cases identified by the *Washington* court which most closely resembles the present case was the one in which "counsel fails to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial." In analyzing these cases the court stated:

As observed above, when effective counsel would discern several plausible lines of defense he should ideally perform a substantial investigation into each line before making a strategic decision as to which lines he will employ at trial. In this ideal, as expressed in the American Bar Association's Standards, is an aspiration to which all defense counsel should strive. It does not, however, respect the constitutional minimum for reasonably effective assistance of counsel. . . . Realistically, given the finite resources of time and money that are available to defense counsel, fewer than all plausible lines of defense will be the subject of substantial investigation. Often counsel will make a choice of trial strategy early in the representation process after conferring with his client, reviewing the State's evidence, and bringing to bear his experience and pro-

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<sup>34</sup> The five categories of cases dealing with claims of ineffective assistance of counsel in the pretrial investigations were: (1) counsel fails to conduct substantial investigation into the one plausible line of defense in the case; (2) counsel conducts a reasonably substantial investigation into the one line of defense that is presented at trial; (3) counsel conducts a reasonably substantial investigation into all plausible lines of defense and chooses to rely upon fewer than all of them at trial; (4) counsel fails to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial; and (5) counsel fails to conduct a substantial investigation into plausible lines of defense for reasons other than strategic choice.

fessional judgment. Thereafter, he will constitute his finite resources on investigating those lines of defense upon which he has chosen to rely.

The choice by counsel to rely upon certain lines of defense to the exclusion of others before investigating all such lines is a strategic choice. . . .

A strategy chosen without the benefit of a reasonably substantial investigation into all plausible lines of defense is generally based upon counsel's professional assumptions regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: When counsel's assumptions are reasonable, given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial. 693 F.2d at 1254-55.

In the present case petitioner's trial counsel was faced with two plausible lines of defense—an alibi defense or a defense that petitioner participated in the robbery but was not the triggerman who killed Officer Schlatt. Pursuing the second defense would almost have guaranteed a conviction for armed robbery and felony murder, for which petitioner could still have received the death penalty or at least life imprisonment.<sup>35</sup> On the other hand, a successful alibi defense offered the prospect of no punishment at all. Trial counsel testified at the state habeas corpus hearing that McCleskey had re-

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<sup>35</sup> Under Georgia law applicable at the time of petitioner's trial, petitioner, as a party to the crime of armed robbery, would have been subject to the same penalty for the death of Officer Schlatt irrespective of whether he actually pulled the trigger. *See* Ga.Code Ann. § 26-801 (now codified at O.C.G.A. § 16-2-21). Under Georgia law at the time both murder and felony murder were punishable by death or life imprisonment. Ga.Code Ann. § 26-1101 (now codified at O.C.G.A. § 16-5-1).

peatedly insisted that he was not present at the crime. Trial counsel also testified that after the preliminary hearing he and McCleskey reasonably believed that an alibi defense could be successful. A primary reason for this belief was that Mamie Thomas, one of the Dixie Furniture Mart employees who was up front when the robber came in and had an opportunity to observe him, was unable to identify McCleskey at the preliminary hearing, despite the fact that she was standing only a few feet from him. Given the contradictory descriptions given by the witnesses at the store, the inability of Mamie Thomas to identify petitioner, and petitioner's repeated statements that he was not present at the scene, and the possible outcome of pursuing the only other defense available, the court cannot say that trial counsel's decision to pursue the alibi defense was unreasonable or constituted ineffective assistance of counsel.

Having made a reasonable strategic choice to pursue an alibi defense, trial counsel could reasonably have decided not to interview all of the store employees. None of the statements produced by petitioner indicates that these employees would have contradicted the State's theory of the case. At best, they might have cumulatively created a reasonable doubt as to whether petitioner was the triggerman. This, however, was a defense counsel and petitioner had chosen not to pursue. Counsel had read their statements and concluded that none of these employees could identify McCleskey as the gunman who entered the front of the store. He also had the sworn testimony of at least one witness that McCleskey was definitely not the person who entered the front of the store. Under such circumstances the failure to interview the store employees was reasonable. *See Washington v. Watkins*, 655 F.2d 1346 (5th Cir. Unit A 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982) (failure to interview in person the only eye witness to an armed robbery and murder not ineffective assistance of counsel where client was asserting an alibi



defense and telephone interview had established that witness could not identify or describe the gunman).<sup>36</sup>

Slightly more troubling than the failure to interview the witnesses at the store was counsel's failure to interview the sheriff's deputies and Offie Evans prior to trial. Evans' testimony was certainly very damaging to petitioner, and a pretrial investigation as to what his testimony would be may have uncovered the details of his escape from a halfway house and the pending federal charges against him, his "understanding" with an Atlanta police detective, his history of drug use, and his imaginative story that he had gone to Florida and participated in an undercover drug investigation during his escape. Discovery of such evidence would have had substantial impeachment value. However, this court cannot find on the facts before it that counsel acted unreasonably in failing to interview Evans prior to trial. Although he recognized that at least one of the names in the prosecution's witness list was a Fulton County Sheriff's Deputy and suspected that a jailhouse confession might be forthcoming, counsel testified that McCleskey told him that he had made absolutely no incriminating statements to anyone in the Fulton County Jail. There has been no allegation that petitioner was incompetent or insane at any time during this proceeding. It would be anomalous, then, for this court to grant petitioner habeas corpus relief on the grounds that petitioner's counsel was ineffective because he did not disbelieve and undertake an independent investigation.

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<sup>36</sup> Although Mamie Thomas recanted her testimony immediately after the preliminary hearing, telling one of the detectives that she had lied because she was scared, and a later interview with her may have disclosed the change of testimony, this court cannot hold as a matter of law that counsel has a duty to disbelieve sworn testimony of a witness favorable to his client. In other words, counsel could reasonably believe that the witness's testimony at trial would be substantially the same as it was at the preliminary hearing. When it turned out to be different, counsel took the proper step of impeaching her later testimony with her testimony at the preliminary hearing.



Finally, petitioner contends that his counsel was ineffective because he failed to interview State's ballistics expert, Kelly Fite. However, a similar claim was rejected on similar facts in *Washington v. Watkins*, 655 F.2d at 1358. Petitioner's counsel had read the expert's report and was prepared adequately to cross-examine the expert at trial. The court does not believe, therefore, that the failure to interview the witness in person prior to trial constituted ineffective assistance of counsel.

*B. Performance During the Trial: Guilt/Innocence Phase.*

Petitioner also contends that counsel's conduct of the trial was deficient in several respects. First, petitioner contends that the failure to move for a continuance or a mistrial when he learned of the suggestive line-up procedure on the morning of the trial constituted ineffective assistance. However, the court has already concluded in Part X, *supra*, that there was nothing unconstitutional about the chance viewing of the defendants prior to trial. The viewing therefore would not have been grounds for a mistrial or a continuance. Failure to make a motion unwarranted in law is not ineffective assistance of counsel.

Petitioner also contends that this counsel failed to object to admission of evidence regarding prior convictions and sentences for armed robbery. Petitioner makes the somewhat technical argument that because these convictions had been set aside by the granting of a motion for a new trial that they were inadmissible. Petitioner further contends that counsel did not object to this evidence because he had failed to investigate the circumstances of these convictions prior to trial.<sup>37</sup> As-

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<sup>37</sup> Pursuant to Ga.Code Ann. § 27-2503(a) the State informed trial counsel on October 2, 1978 that it intended to offer in aggravation certain prior convictions and sentences of petitioner. The convictions and sentences which petitioner contends were invalid were among those listed.

suming for the moment that the failure to investigate these convictions constituted ineffective assistance of counsel, the court is unconvinced that petitioner can show actual and substantial prejudice resulted from the ineffectiveness. See *Washington v. Strickland*, 693 F.2d 1243, 1262 (5th Cir. Unit B) 1982) (en banc) cert. granted, — U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). First, petitioner does not contend that he was not guilty of those crimes. In fact, after being granted a new trial he pleaded guilty to them and received an 18-year sentence. The court has already held that under Georgia law those crimes were admissible to show that petitioner engaged in a pattern or practice of armed robberies. The court cannot say that counsel's failure to object to the introduction of this evidence at the guilt stage caused petitioner actual and substantial prejudice. Also, whole the jury did learn that petitioner had received life sentences which had subsequently been set aside and this fact may have prejudiced them at the penalty stage of petitioner's trial,<sup>38</sup> the court is unprepared to say that in the context of all of the evidence, the failure of counsel to object to the introduction of this evidence warrants petitioner a new trial. However, given the court's holding in Part III, *supra*, this point is essentially moot.

Finally, petitioner contends that trial counsel was ineffective because he failed to object to the trial court's "overly broad instructions to the jury (1) with regard to presumptions of intent and (2) as to the use of 'other acts' evidence for proof of intent, and (3) as aggravating circumstances at the sentencing phase." Petitioner's September 20, 1983 Memorandum of Law in Support of Issuance of the Writ at 64. This court has already found that the trial court's instructions were not erroneous or overbroad. See Parts IV, VII and VIII, *supra*. Failure to object to the instructions was not, therefore, ineffective assistance of counsel.

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<sup>38</sup> See note 26, *supra*.

C. *Ineffective Assistance at Trial—Sentencing Phase.*

Petitioner has contended that trial counsel was ineffective because he failed to undertake an independent investigation to discover and produce mitigating evidence and witnesses to testify on behalf of petitioner at the sentencing phase of his trial. Trial counsel testified that he asked petitioner for names of persons who would be willing to testify for him and that petitioner was unable to produce a single name. Counsel also testified that he contacted petitioner's sister and that she also was unable to produce any names.<sup>39</sup> A review of trial counsel's testimony at the state habeas hearing convinces this court that counsel made a reasonable effort to uncover mitigating evidence but could find none. Petitioner's sister declined to testify on her brother's behalf and told counsel that petitioner's mother was unable to testify because of illness. *McCleskey v. Zant*, H.C. No. 4909, Slip Op. at 19 (Sup.Ct. of Butts County, April 8, 1981). The record simply does not support a finding of actual and substantial prejudice to petitioner due to any ineffective assistance by petitioner's counsel at the sentencing phase of the trial.

D. *Ineffective Assistance—Post-Trial.*

Petitioner contends that trial counsel was also ineffective in failing to correct inaccuracies and omissions in the trial judge's post-trial sentencing report.<sup>40</sup>

<sup>39</sup> The sister testified at the state habeas hearing that counsel never asked her for any names and that if he had done so she would have been ready, willing and able to produce a number of names. The habeas court specifically chose to credit the testimony of the trial counsel rather than the sister. See *McCleskey v. Zant*, H.C. No. 4909, Slip Op. at 19 (Sup.Ct. of Butts County, April 8, 1981). This finding of fact is presumed to be correct. 28 U.S.C. § 2254(d).

<sup>40</sup> Georgia's capital sentencing procedure provides for the filing of a trial judge's report to be part of the record reviewed by the Georgia Supreme Court on appeal. O.C.G.A. § 17-10-35.

This report is used by the Georgia Supreme Court as part of its review of whether the sentence imposed was arbitrary, excessive, or disproportionate.<sup>41</sup> While it was in part because the Georgia capital sentencing procedure provided such a review that the Supreme Court upheld the Georgia death penalty in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Supreme Court has recently declared that such proportionality reviews are not required by the Constitution. *Pulley v. Harris*, — U.S. — at — —, 104 S.Ct. 871 at 876-881, 79 L.Ed.2d 29 (1984). Since proportionality reviews are not required by the Constitution, it is difficult for this court to see actual and substantial prejudice caused to petitioner by counsel's failure to review and correct mistakes in the trial judge's report, even if such failure would constitute ineffective assistance of counsel.

Since the court has concluded that petitioner has been unable to show actual and substantial prejudice caused by any ineffective assistance of counsel, petitioner's Claim "P" is without merit.

## XVII. CONCLUSION

For the reasons set forth in Part III, *supra*, it is ORDERED, ADJUDGED, and DECREED that petitioner's conviction for malice murder be set aside and that petitioner within one hundred twenty (120) days after this judgment becomes final as a result of the failure of respondent to lodge an appeal or as the result of the issuance of a mandate affirming this decision, whichever is later, be reindicted and tried, failing which this writ of habeas corpus without further order shall be made absolute.

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<sup>41</sup> For a discussion of proportionality analysis in Eighth Amendment jurisprudence see Comment "Down the Road Toward Human Decency": *Eighth Amendment Proportionality Analysis and Solem vs. Helm*, 18 Ga.L.Rev. 109 (1983).

TABLE 1

## RACE OF THE VICTIM

	DB61	DB70	DB73	DB74	DB77	DB80	DB78	DB83	DB83	DB83	DB79A	DB83	DB80	DB85	DB102
Unadjusted	1	1	1	1	2	9	10	13	14	44	83	136	230	230	250
Incremental Increase in Death Sentencing Rate	10 pts.	.17 pt.	.09	.17	.09	.07	.07	.06	.06	.07	.10	.07	.06	.06	.04
"P" Value		.0001	.0001	.001	.0001	.001	.0014	.001	.001	.0002	.001	.01	.01	.021	.04

## RACE OF THE DEFENDANT

	DB61	DB70	DB73	DB74	DB77	DB80	DB78	DB83	DB83	DB83	DB79A	DB83	DB80	DB85	DB102
Unadjusted	1	1	1	1	2	9	10	13	14	44	83	136	230	230	250
Incremental Increase in Death Sentencing Rate	-0.3	.10	.05	.10	.05	.04	.04	.05	.06	.06	.07	.06	.06	.06	.04
"P" Value		.0001	.031	.01	.03	.10	.09	.01	.001	.0004	.01	.01	.01	.02	.05





UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT

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No. 84-8176

WARREN McCLESKEY, PETITIONER-APPELLEE,  
CROSS-APPELLANT

v.

RALPH KEMP, Warden, RESPONDENT-APPELLANT,  
CROSS-APPELLEE

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Jan. 29, 1985

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OPINION OF THE COURT

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, JAMES C. HILL, FAY, VANCE, KRAVITCH, JOHNSON, ALBERT J. HENDERSON, HATCHETT, R. LANIER ANDERSON, III, and CLARK, Circuit Judges.

RONEY, Circuit Judge, with whom Judges, TJOFLAT, JAMES C. HILL, FAY, VANCE, ALBERT J. HENDERSON and R. LANIER ANDERSON, III, join \*:

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\* All of the Judges of the Court concur in the judgment as to the death-oriented jury claim and the ineffective assistance of counsel claim. Judges Tjoflat, Vance and Anderson join in the opinion but each has written separately on the constitutional application of the Georgia death sentence.

Judge Kravitch has written separately to concur only in the harmless error portion of the opinion on the *Giglio* issue but joins in the opinion on all other issues.

Chief Judge Godbold dissents from the judgment of the Court on the *Giglio* issue but joins in the opinion on all other issues.

Judges Johnson, Hatchett and Clark dissent from the judgment of the Court on the constitutional application of the Georgia death sentence and the *Sandstrom* and *Giglio* issues and each has written a separate dissenting opinion.

This case was taken *en banc* principally to consider the argument arising in numerous capital cases that statistical proof shows the Georgia capital sentencing law is being administered in an unconstitutionally discriminatory and arbitrary and capricious matter. After a lengthy evidentiary hearing which focused on a study by Professor David C. Baldus, the district court concluded for a variety of reasons that the statistical evidence was insufficient to support the claim of unconstitutionality in the death sentencing process in Georgia. We affirm the district court's judgment on this point.

The *en banc* court has considered all the other claims involved on this appeal. On the State's appeal, we reverse the district court's grant of habeas corpus relief on the claim that the prosecutor failed to disclose a promise of favorable treatment to a state witness in violation of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1982). We affirm the judgment denying relief on all other points raised by the defendant, that is: (1) that defendant received ineffective assistance of counsel; (2) that jury instructions contravened the due process clause in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979); and (3) that the exclusion of death-scrupled jurors violated the right to an impartial and unbiased jury drawn from a representative cross-section of the community.

Thus, concluding that the district court should have denied the petition for writ of habeas corpus, we affirm on all claims denied by the court, but reverse the grant of habeas corpus relief on the *Giglio* claims.

## FACTS

Warren McCleskey was arrested and charged with the murder of a police officer during an armed robbery of the Dixie Furniture Store. The store was robbed by a band of four men. Three entered through the back door and one through the front. While the men in the rear of

the store searched for cash, the man who entered through the front door secured the showroom by forcing everyone there to lie face down on the floor. Responding to a silent alarm, a police officer entered the store by the front door. Two shots were fired. One shot struck the police officer in the head causing his death. The other glanced off a cigarette lighter in his chest pocket.

McCleskey was identified by two of the store personnel as the robber who came in the front door. Shortly after his arrest, McCleskey confessed to participating in the robbery but maintained that he was not the triggerman. McCleskey confirmed the eyewitness' accounts that it was he who entered through the front door. One of his accomplices, Ben Wright, testified that McCleskey admitted to shooting the officer. A jail inmate housed near McCleskey testified that McCleskey made a "jail house confession" in which he claimed he was the triggerman. The police officer was killed by a bullet fired from a .38 caliber Rossi handgun. McCleskey had stolen a .38 caliber Rossi in a previous holdup.

### PRIOR PROCEEDINGS

The jury convicted McCleskey of murder and two counts of armed robbery. At the penalty hearing, neither side called any witnesses. The State introduced documentary evidence of McCleskey's three prior convictions for armed robbery.

The jury sentenced McCleskey to death for the murder of the police officer and to consecutive life sentences for the two counts of armed robbery. These convictions and sentences were affirmed by the Georgia Supreme Court. *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146, *cert. denied*, 449 U.S. 891, 101 S.Ct. 253, 66 L.Ed.2d 119 (1980). McCleskey then petitioned for habeas corpus relief in state court. This petition was denied after an evidentiary hearing. The Georgia Supreme Court denied McCleskey's application for a certificate of probable cause to appeal. The United States Supreme Court de-

nied a petition for a writ of certiorari. *McCleskey v. Zant*, 454 U.S. 1093, 102 S.Ct. 659, 70 L.Ed.2d 631 (1981).

McCleskey then filed his petition for habeas corpus relief in federal district court asserting, among other things, the five constitutional challenges at issue on this appeal. After an evidentiary hearing and consideration of extensive memoranda filed by the parties, the district court entered the lengthy and detailed judgment from which these appeals are taken. *McCleskey v. Zant*, 580 F.Supp. 338 (N.D.Ga.1984).

This opinion addresses each issue asserted on appeal in the following order: (1) the *Giglio* claim, (2) constitutionality of the application of Georgia's death penalty, (3) effective assistance of counsel, (4) death-qualification of jurors, and (5) the *Sandstrom* issue.

### GIGLIO CLAIM

The district court granted habeas corpus relief to McCleskey because it determined that the state prosecutor failed to reveal that one of its witnesses had been promised favorable treatment as a reward for his testimony. The State violates due process when it obtains a conviction through the use of false evidence or on the basis of a witness's testimony when that witness has failed to disclose a promise of favorable treatment from the prosecution. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

We hold that (1) there was no promise in this case, as contemplated by *Giglio*; and (2) in any event, had there been a *Giglio* violation, it would be harmless. Thus, we reverse the grant of habeas corpus relief on this ground.

Offie Gene Evans, a prisoner incarcerated with McCleskey, was called by the State on rebuttal to strengthen its proof that McCleskey was the triggerman at the hold-up. Evans testified that McCleskey admitted to him in jail that he shot the policeman and that McCleskey said he



had worn makeup to disguise his appearance during the robbery.

### *The "Promise"*

At McCleskey's state habeas corpus, hearing, Evans gave the following account of certain conversations with state officials.

THE COURT: Mr. Evans, let me ask you a question. At the time that you testified in Mr. McCleskey's trial, had you been promised anything in exchange for your testimony?

THE WITNESS: No, I wasn't. I wasn't promised nothing about—I wasn't promised nothing by the D.A. but the Detective told me that he would—he said he was going to do it himself, speak a word for me. That was what the Detective told me.

Q: (by McCleskey's attorney): The Detective said he would speak a word for you?

A: Yeah.

A deposition of McCleskey's prosecutor that was taken for the state habeas corpus proceeding reveals that the prosecutor contacted federal authorities after McCleskey's trial to advise them of Evans' cooperation and that the escape charges were dropped.

### *The Trial Testimony*

At the trial, the State brought out on direct examination that Evans was incarcerated on the charge of escape from a federal halfway house. Evans denied receiving any promises from the prosecutor and downplayed the seriousness of the escape charge.

Q: [by prosecutor]: Mr. Evans, have I promised you anything for testifying today?

A: No, sir, you ain't.

Q: You do have an escape charge still pending, is that correct?

A: Yes, sir. I've got one, but really it ain't no escape, what the peoples out there tell me, because

something went wrong out there so I just went home. I stayed at home and when I called the man and told him that I would be a little late coming in, he placed me on escape charge and told me there wasn't no use of me coming back, and I just stayed on at home and he come and picked me up.

Q: Are you hoping that perhaps you won't be prosecuted for escape?

A: Yeah, I hope I don't, but I don't—what they tell me, they ain't going to charge me with escape no way.

Q: Have you asked me to try to fix it so you wouldn't get charged with escape?

A: No, sir.

Q. Have I told you I would try to fix it for you?

A: No, sir.

### *The State Habeas Corpus Decision*

The state court rejected McCleskey's *Giglio* claim on the following reasoning:

Mr. Evans at the habeas hearing denied that he was promised anything for his testimony. He did state that he was told by Detective Dorsey that Dorsey would 'speak a word' for him. The detective's *ex parte* communication recommendation alone is not sufficient to trigger the applicability of *Giglio v. United States*, 405 U.S. 150 [92 S.Ct. 763, 31 L.Ed. 2d 104] (1972).

The prosecutor at petitioner's trial, Russell J. Parker, stated that he was unaware of any understandings between Evans and any Atlanta Police Department detectives regarding a favorable recommendation to be made on Evans' federal escape charge. Mr. Parker admitted that there was opportunity for Atlanta detectives to put in a good word for Evans with federal authorities. However, he further stated that when any police officer has been killed and someone

ends up testifying for the State, putting his life in danger, it is not surprising that charges, like those against Evans, will be dropped.

In the absence of any other evidence, the Court cannot conclude an agreement existed merely because of subsequent disposition of criminal charges against a witness for the State.

Although it is reasonable to conclude that the state court found that there was no agreement between Evans and the prosecutor, no specific finding was made as to Evans' claim that a detective promised to "speak a word for him." The court merely held as a matter of law that assuming Evans was telling the truth, no *Giglio* violation had occurred.

#### *Was It a Promise?*

The Supreme Court's rationale for imposing this rule is that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959). The Court has never provided definitive guidance on when the Government's dealings with a prospective witness so affect the witness' credibility that they must be disclosed at trial. In *Giglio*, a prosecutor promised the defendant's alleged co-conspirator that no charges would be brought against him if he testified against the defendant. In *Napue*, a prosecutor promised a witness that in exchange for his testimony the prosecutor would recommend that the sentence the witness was presently serving be reduced.

In this case, the detective's promise to speak a word falls far short of the understandings reached in *Giglio* and *Napue*. As stated by this Court, "[t]he thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony." *Smith v. Kemp*, 715 F.2d 1459, 1467 (11th Cir.), cert. denied, — U.S. —, 104 S.Ct. 510, 78

L.Ed.2d 699 (1983). The detective's statement offered such a marginal benefit, as indicated by Evans, that it is doubtful it would motivate a reluctant witness, or that disclosure of the statement would have had any effect on his credibility. The State's nondisclosure therefore failed to infringe McCleskey's due process rights.

*Was Any Violation Harmless?*

In any event, there is no "reasonable likelihood" that the State's failure to disclose the detective's cryptic statement or Evans' different escape scenario affected the judgment of the jury. See *Giglio*, 405 U.S. at 154, 92 S.Ct. at 766. Evans' credibility was exposed to substantial impeachment even without the detective's statement and the inconsistent description of his escape. The prosecutor began his direct examination by having Evans recite a litany of past convictions for forgery, two burglaries, larceny, carrying a concealed weapon, and theft from the United States mail. On cross examination, McCleskey's attorney attempted to portray Evans as a "professional criminal". Evans also admitted that he was testifying to protect himself and one of McCleskey's codefendants. In light of this substantial impeachment evidence, we find it unlikely that the undisclosed information would have affected the jury's assessment of Evans' credibility. See *United States v. Anderson*, 574 F.2d 1347, 1356 (5th Cir.1978).

McCleskey claims Evans' testimony was crucial because the only other testimony which indicated he pulled the trigger came from his codefendant, Ben Wright. Ben Wright's testimony, McCleskey urges, would have been insufficient under Georgia law to convict him without the corroboration provided by Evans. In Georgia, an accomplice's testimony alone in felony cases is insufficient to establish a fact. O.C.G.A. § 24-4-8. Wright's testimony, however, was corroborated by McCleskey's own confession in which McCleskey admitted participation in the robbery. See *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386, 388

(1976). Corroboration need not extend to every material detail. *Blalock v. State*, 250 Ga. 441, 298 S.E.2d 477, 479-80 (1983); *Cofer v. State*, 166 Ga.App. 436, 304 S.E.2d 537, 539 (1983).

The district court thought Evans' testimony critical because of the information he supplied about makeup and McCleskey's intent in shooting the police officer. Although we agree that his testimony added weight to the prosecution's case, we do not find that it could "in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154, 92 S.Ct. at 766 (quoting *Napue v. Illinois*, 360 U.S. at 271, 79 S.Ct. at 1178). Evans, who was called only in rebuttal, testified that McCleskey had told him that he knew he had to shoot his way out, and that even if there had been twelve policemen he would have done the same thing. This statement, the prosecutor argued, showed malice. In his closing argument, however, the prosecutor presented to the jury three reasons supporting a conviction for malice murder. First, he argued that the physical evidence showed malicious intent because it indicated that McCleskey shot the police officer once in the head and a second time in the chest as he lay dying on the floor. Second, the prosecutor asserted that McCleskey had a choice, either to surrender or to kill the officer. That he chose to kill indicated malice. Third, the prosecutor contended that McCleskey's statement to Evans that he still would have shot his way out if there had been twelve police officers showed malice. This statement by McCleskey was not developed at length during Evans' testimony and was mentioned only in passing by the prosecutor in closing argument.

Evans' testimony that McCleskey had made up his face corroborated the identification testimony of one of the eyewitnesses. Nevertheless, this evidence was not crucial to the State's case. That McCleskey was wearing makeup helps to establish he was the robber who entered the furniture store through the front door. This fact had already been directly testified to by McCleskey's accomplice and



two eyewitnesses as well as corroborated by McCleskey's own confession. That Evans' testimony buttresses one of the eyewitnesses' identifications is relatively unimportant.

Thus, although Evans' testimony might well be regarded as important in certain respects, the corroboration of that testimony was such that the revelation of the *Giglio* promise would not reasonably affect the jury's assessment of his credibility and therefore would have had no effect on the jury's decision. The district court's grant of habeas corpus relief on this issue must be reversed.

### CONSTITUTIONAL APPLICATION OF GEORGIA'S DEATH PENALTY

In challenging the constitutionality of the application of Georgia's capital statute, McCleskey alleged two related grounds for relief: (1) that the "death penalty is administered arbitrarily, capriciously, and whimsically in the State of Georgia," and (2) it "is imposed . . . pursuant to a pattern and practice . . . to discriminate on the grounds of race," both in violation of the Eighth and Fourteenth Amendments of the Constitution.

The district court granted petitioner's motion for an evidentiary hearing on his claim of system-wide racial discrimination under the Equal Protection Clause of the Fourteenth Amendment. The court noted that "it appears . . . that petitioner's Eighth Amendment argument has been rejected by this Circuit in *Spinkellink v. Wainwright*, 578 F.2d 582, 612-14 (5th Cir.1978) . . . [but] petitioner's Fourteenth Amendment claim may be appropriate for consideration in the context of statistical evidence which the petitioner proposes to present." Order of October 8, 1982, at 4.

An evidentiary hearing was held in August, 1983. Petitioner's case in chief was presented through the testimony of two expert witnesses, Professor David C. Baldus and Dr. George Woodworth, as well as two principal lay witnesses, Edward Gates and L.G. Warr, an official em-

ployed by Georgia Board of Pardons and Paroles. The state offered the testimony of two expert witnesses, Dr. Joseph Katz and Dr. Roger Burford. In rebuttal, petitioner recalled Professor Baldus and Dr. Woodworth, and presented further expert testimony from Dr. Richard Berk.

In a comprehensive opinion, reported at 580 F.Supp. 338, the district court concluded that petitioner failed to make out a *prima facie* case of discrimination in sentencing based on either the race of victims or the race of defendants. The Court discounted the disparities shown by the Baldus study on the ground that the research (1) showed substantial flaws in the data base, as shown in tests revealing coding errors and mismatches between items on the Procedural Reform Study (PRS) and Comprehensive Sentencing Study (CSS) questionnaires; (2) lacked accuracy and showed flaws in the models, primarily because the models do not measure decisions based on knowledge available to decisionmaker and only predicts outcomes in 50 percent of the cases; and (3) demonstrated multi-collinearity among model variables, showing interrelationship among the variables and consequently distorting relationships, making interpretation difficult.

The district court further held that even if a *prima facie* case had been established, the state had successfully rebutted the showing because: (1) the results were not the product of good statistical methodology, (2) other explanations for the study results could be demonstrated, such as, white victims were acting as proxies for aggravated cases, and (3) black-victim cases being left behind at the life sentence and voluntary manslaughter stages, are less aggravated and more mitigated than the white-victim cases disposed of in similar fashion.

The district court concluded that petitioner failed to carry his ultimate burden of persuasion, because there is no consistent statistically significant evidence that the death penalty is being imposed on the basis of the race of defendant. In particular there was no statistically significant evidence produced to show that prosecutors

are seeking the death penalty or juries are imposing the death penalty because the defendant is black or the victim is white. Petitioner conceded that the study is incapable of demonstrating that he was singled out for the death penalty because of the race of either himself or his victim, and, therefore, petitioner failed to demonstrate that racial considerations caused him to receive the death penalty.

We adopt the following approach in addressing the argument that the district court erred in refusing to hold that the Georgia statute is unconstitutionally applied in light of the statistical evidence. *First*, we briefly describe the statistical Baldus study that was done in this case. *Second*, we discuss the evidentiary value such studies have in establishing the ultimate facts that control a constitutional decision. *Third*, we discuss the constitutional law in terms of what must be proved in order for petitioner to prevail on an argument that a state capital punishment law is unconstitutionally applied because of race discrimination. *Fourth*, we discuss whether a generalized statistical study such as this could ever be sufficient to prove the allegations of ultimate fact necessary to sustain a successful constitutional attack on a defendant's sentence. *Fifth*, we discuss whether this study is valid to prove what it purports to prove. *Sixth*, we decide that this particular study, assuming its validity and that it proves what it claims to prove, is insufficient to either require or support a decision for petitioner.

In summary, we affirm the district court on the ground that, assuming the validity of the research, it would not support a decision that the Georgia law was being unconstitutionally applied, much less would it compel such a finding, the level which petitioner would have to reach in order to prevail on this appeal.

### *The Baldus Study*

The Baldus study analyzed the imposition of sentence in homicide cases to determine the level of disparities attributable to race in the rate of the imposition of the

death sentence. In the first study, Procedural Reform Study ( PRS), the results revealed no race-of-defendant effects whatsoever, and the results were unclear at that stage as to race-of-victim effects.

The second study, the Charging and Sentencing Study (CSS), consisted of a random stratified sample of all persons indicted for murder from 1973 through 1979. The study examined the cases from indictment through sentencing. The purpose of the study was to estimate racial effects that were the product of the combined effects of all decisions from the point of indictment to the point of the final death-sentencing decision, and to include strength of the evidence in the cases.

The study attempted to control for all of the factors which play into a capital crime system, such as aggravating circumstances, mitigating circumstances, strength of evidence, time period of imposition of sentence, geographical areas (urban/rural), and race of defendant and victim. The data collection for these studies was exceedingly complex, involving cumbersome data collection instruments, extensive field work by multiple data collectors and sophisticated computer coding, entry and data cleaning processes.

Baldus and Woodworth completed a multitude of statistical tests on the data consisting of regression analysis, indexing factor analysis, cross tabulation, and triangulation. The results showed a 6% racial effect systemwide for white victim, black defendant cases with an increase to 20% in the mid-range of cases. There was no suggestion that a uniform, institutional bias existed that adversely affected defendants in white victim cases in all circumstances or a black defendant in all cases.

The object of the Baldus study in Fulton County, where McCleskey was convicted, was to determine whether the sentencing pattern disparities that were observed statewide with respect to race of the victim and race of defendant were pertinent to Fulton County, and whether the evidence concerning Fulton County shed any light on



Warren McCleskey's death sentence as an aberrant death sentence, or whether racial considerations may have played a role in the disposition of his case.

Because there were only ten cases involving police officer victims in Fulton County, statistical analysis could not be utilized effectively. Baldus conceded that it was difficult to draw any inference concerning the overall race effect in these cases because there had only been one death sentence. He concluded that based on the data there was only a *possibility* that a racial factor existed in McCleskey's case.

### *Social Science Research Evidence*

To some extent a broad issue before this Court concerns the role that social science is to have in judicial decision-making. Social science is a broad-based field consisting of many specialized discipline areas, such as psychology, anthropology, economics, political science, history and sociology. Cf. Sperlich, *Social Science Evidence and the Courts: Reaching Beyond the Advisory Process*, 63 *Judicature* 280, 283 n. 14 (1980). Research consisting of parametric and nonparametric measures is conducted under both laboratory controlled situations and uncontrolled situations, such as real life observational situations, throughout the disciplines. The broad objectives for social science research are to better understand mankind and its institutions in order to more effectively plan, predict, modify and enhance society's and the individual's circumstances. Social science as a *nonexact* science is always mindful that its research is dealing with highly complex behavioral patterns that exist in a highly technical society. At best, this research "models" and "reflects" society and provides society with trends and information for broad-based generalizations. The researcher's intent is to use the conclusions from research to predict, plan, describe, explain, understand or modify. To utilize conclusions from such research to explain the specific intent of a specific behavioral situation goes beyond the legiti-



mate uses for such research. Even when this research is at a high level of exactness, in design and results, social scientists readily admit their steadfast hesitancies to conclude such results can explain specific behavioral actions in a certain situation.

The judiciary is aware of the potential limitations inherent in such research: (1) the imprecise nature of the discipline; (2) the potential inaccuracies in presented data; (3) the potential bias of the researcher; (4) the inherent problems with the methodology; (5) the specialized training needed to assess and utilize the data competently, and (6) the debatability of the appropriateness for courts to use empirical evidence in decisionmaking. Cf. Henry, *Introduction: A Journey into the Future—The Role of Empirical Evidence in Developing Labor Law*, 1981 U.Ill.L.Rev. 1, 4; Sperlich, 63 *Judicature* at 283 n. 14.

Historically, beginning with "Louis Brandeis' use of empirical evidence before the Supreme Court . . . persuasive social science evidence has been presented to the courts." Forst, Rhodes & Wellford, *Sentencing and Social Science: Research for the Formulation of Federal Guidelines*, 7 Hofstra L.Rev. 355 (1979). See *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). The Brandeis brief presented social facts as corroborative in the judicial decisionmaking process. O'Brien, *Of Judicial Myths, Motivations and Justifications: A Postscript on Social Science and the Law*, 64 *Judicature* 285, 288 (1981). The Brandeis brief "is a well-known technique for asking the court to take judicial notice of social facts." Sperlich, 63 *Judicature* at 280, 285 n. 31. "It does not solve the problem of how to bring valid scientific materials to the attention of the court. . . . Brandeis did not argue that the data were valid, only that they existed. . . . The main contribution . . . was to make extra-legal data readily available to the court." *Id.*

This Court has taken a position that social science research does play a role in judicial decisionmaking in cer-

tain situations, even in light of the limitations of such research. Statistics have been used primarily in cases addressing discrimination.

Statistical analysis is useful only to show facts. In evidentiary terms, statistical studies based on correlation are circumstantial evidence. They are not direct evidence. *Teamsters v. United States*, 431 U.S. 324, 340, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977). Statistical studies do not purport to state what the law is in a given situation. The law is applied to the facts as revealed by the research.

In this case the realities examined, based on a certain set of facts reduced to data, were the descriptive characteristics and numbers of persons being sentenced to death in Georgia. Such studies reveal, as circumstantial evidence through their study analyses and results, possible, or probable, relationships that may exist in the realities studied.

The usefulness of statistics obviously depends upon what is attempted to be proved by them. If disparate impact is sought to be proved, statistics are more useful than if the causes of that impact must be proved. Where intent and motivation must be proved, the statistics have even less utility. This Court has said in discrimination cases, however, "that while statistics alone usually cannot establish intentional discrimination, under certain limited circumstances they might." *Spencer v. Zant*, 715 F.2d 1562, 1581 (11th Cir. 1983), *on pet. for reh'g and for reh'g en banc*, 729 F.2d 1293 (11th Cir. 1984). *See also Eastland v. Tennessee Valley Authority*, 704 F.2d 613, 618 (11th Cir. 1983); *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 421 (5th Cir. 1980), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). These limited circumstances are where the statistical evidence of racially disproportionate impact is so strong as to permit no inference other than that the results are the product of a racially discriminatory intent or purpose. *See Smith v. Balkcom*, 671 F.2d 858 (5th Cir. Unit B), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982).

Statistical evidence has been received in two ways. The United States Supreme Court has simply recognized the existence of statistical studies and social science research in making certain decisions, without such studies being subject to the rigors of an evidentiary hearing. *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908); *Fowler v. North Carolina*, 428 U.S. 904, 96 S.Ct. 3212, 49 L.Ed.2d 1212 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The "Supreme Court, for example, encountered severe criticism and opposition to its rulings on desegregation of public schools, the exclusionary rule, and the retroactivity of its decisions, precisely because the court relied on empirical generalization." O'Brien, *The Seduction of the Judiciary: Social Science and the Courts*, 64 *Judicature* 8, 19 (1980). In each of these situations the Court "focused" beyond the specifics of the case before it to the "institutions" represented and through a specific ruling effected changes in the institutions. On the other hand, statistical evidence may be presented in the trial court through direct testimony and cross-examination on statistical information that bears on an issue. Such evidence is examined carefully and subjected to the tests of relevancy, authenticity, probativeness and credibility. Cf. Henry, 1981 U.Ill.L.Rev. at 8.

One difficulty with statistical evidence is that it may raise more questions than it answers. This Court reached that conclusion in *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. Unit A 1981). In *Wilkins* this Court held that "[m]ultiple regression analysis is a relatively sophisticated means of determining the effects that any number of different factors have on a particular variable." *Id.* at 402-03. This Court noted that the methodology "is subject to misuse and thus must be employed with great

care." *Id.* at 403. Procedurally, when multiple regression is used "it will be the subject of expert testimony and knowledgeable cross-examination from both sides. In this manner, the validity of the model and the significance of its results will be fully developed at trial, allowing the trial judge to make an informed decision as to the probative value of the analysis." *Id.* Having done this, the *Wilkins* Court, in an employment discrimination case, held "the statistical evidence associated with the multiple regression analysis is inconclusive raising more questions than it answers." *Id.*

Even if the statistical evidence is strong there is generally a need for additional evidence. In *Wade v. Mississippi Cooperative Extension Serv.*, 528 F.2d 508 (5th Cir. 1976), the results drawn from the multivariate regression analysis were supported by additional evidence. *Id.* at 517. In *Wade* the statistics did not "stand alone" as the sole proof of discrimination.

Much has been written about the relationship of law and social science. "If social science cannot produce the required answers, and it probably cannot, its use is likely to continue to lead to a disjointed incrementalism." Daniels, *Social Science And Death Penalty Cases*, 1 Law & Pol'y Q. 336, 367 (1979). "Social science can probably make its greatest contribution to legal theory by investigating the causal forces behind judicial, legislative and administrative decisionmaking and by probing the general effects of such decisions." Nagel, *Law And The Social Sciences: What Can Social Science Contribute?* 356 A.B. A.J. 356, 357-58 (1965).

With these observations, the Court accepts social science research for what the social scientist should claim for it. As in all circumstantial evidence cases, the inferences to be drawn from the statistics are for the factfinder, but the statistics are accepted to show the circumstances.



*Racial Discrimination, the Death Penalty, and the Constitution*

McCleskey contends his death sentence is unconstitutional because Georgia's death penalty is discriminatorily applied on the basis of the race of the defendant and the victim. Several different constitutional bases for this claim have been asserted. McCleskey relies on the arbitrary, capricious and irrational components of the prohibition of cruel and unusual punishment in the Eighth Amendment and the equal protection clause of the Fourteenth Amendment. The district court though that with respect to race-of-the-victim discrimination the petitioner more properly stated a claim under the due process clause of the Fourteenth Amendment.

Claims of this kind are seldom asserted with a degree of particularity, and they generally assert several constitutional precepts. On analysis, however, there seems to be little difference in the proof that might be required to prevail under any of the three theories.

In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court struck down the Georgia death penalty system on Eighth Amendment grounds, with several of the concurring justices holding that the system operated in an arbitrary and capricious manner because there was no rational way to distinguish the few cases in which death was imposed from the many in which it was not. *Id.* at 313, 92 S.Ct. at 2764 (White, J., concurring); *id.* at 309-10, 92 S.Ct. at 2762-63 (Stewart, J. concurring). Although race discrimination in the imposition of the death penalty was not the basis of the decision, it was one of several concerns addressed in both the concurring and dissenting opinions. See *id.* at 249-52, 92 S.Ct. at 2731-33 (Douglas, J. concurring); *id.* at 309-10, 92 S.Ct. at 2762-63 (Stewart, J. concurring); *id.* at 364-65, 92 S.Ct. at 2790-91 (Marshall, J., concurring); *id.* at 389-90 n. 12, 92 S.Ct. at 2803-04 n. 12 (Burger, C.J., dissenting); *id.* at 449, 92 S.Ct. at 2833 (Powell, J., dissenting).



Four years later, the Supreme Court approved the redrawn Georgia statute pursuant to which McCleskey was tried and sentenced. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). At the same time the Court approved statutes from Florida and Texas which, like Georgia, followed a guided discretion approach, but invalidated the mandatory sentencing procedure of North Carolina and Louisiana. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

Since *Gregg*, we have consistently held that to state a claim of racial discrimination in the application of a constitutional capital statute, intent and motive must be alleged. *Sullivan v. Wainwright*, 721 F.2d 316, 317 (11th Cir.1983) (statistical impact studies insufficient to show state system "intentionally discriminated against petitioner"), *petition for stay of execution denied*, — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); *Adams v. Wainwright*, 709 F.2d 1443, 1449 (11th Cir.1983) (requiring "a showing of an intent to discriminate" or "evidence of disparate impact . . . so strong that the only permissible inference is one of intentional discrimination"), *cert. denied*, — U.S. —, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); *Smith v. Balkcom*, 671 F.2d 858, 859 (5th Cir.Unit B) (requiring "circumstantial or statistical evidence of racially disproportionate impact . . . so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose"), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982).

Initially in *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), the Court rejected Eighth and Fourteenth Amendment claims that the Florida death penalty was being applied in a discriminatory fashion on

the basis of the victim's race. The *Spinkellink* Court read *Gregg* and its companion cases "as holding that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness—and therefore the racial discrimination condemned in *Furman*—have been conclusively removed." *Id.* at 613-14: *Spinkellink* can not be read to foreclose automatically all Eighth Amendment challenges to capital sentencing conducted under a facially constitutional statute. In *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Supreme Court sustained an Eighth Amendment challenge to a Georgia death sentence because the Georgia court's construction of a portion of that facially valid statute left no principled way to distinguish the cases where the death penalty was imposed from those in which it was not. See *Proffitt v. Wainwright*, 685 F.2d 1227, 1261 n. 52 (11th Cir.1982). Nevertheless, neither *Godfrey* nor *Proffitt* undermines this Court's prior and subsequent pronouncements in *Spinkellink*, *Smith*, *Adams*, and *Sullivan* regarding the amount of disparate impact that must be shown under either an Eighth Amendment or equal protection analysis.

As the district court here pointed out, such a standard indicates an analytical nexus between Eighth Amendment claims and a Fourteenth Amendment equal protection claim. *McCleskey v. Zant*, 580 F.Supp. 338, 347 (N.D.Ga. 1984). Where an Eighth Amendment claim centers around generalized showings of disparate racial impact in capital sentencing, such a connection is inescapable. Although conceivably the level or amount of disparate racial impact that would render a state's capital sentencing system arbitrary and capricious under the Eighth Amendment might differ slightly from the level or amount of disparate racial impact that would compel an inference of discriminatory intent under the equal protection clause of the Fourteenth Amendment, we do not need to decide whether there could be a difference in magnitude that would lead to opposite conclusions on a system's constitutionality depending on which theory a claimant asserts.

A successful Eighth Amendment challenge would require proof that the race factor was operating in the system in such a pervasive manner that it could fairly be said that the system was irrational, arbitrary and capricious. For the same reasons that the Baldus study would be insufficient to demonstrate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context, it would be insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis.

The district court stated that were it writing on a clean slate, it would characterize McCleskey's claim as a due process claim. The court took the position that McCleskey's argument, while couched in terms of "arbitrary and capricious," fundamentally contended that the Georgia death penalty was applied on the basis of a morally impermissible criterion: the race of the victim.

The district court's theory derives some support from the Supreme Court's decision in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The Court there recognized that a state may not attach the "aggravating" label as an element in capital sentencing to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as race. If that were done, the Court said, "due process would require that the jury's decision to impose death be set aside." *Id.* 462 U.S. at —, 103 S.Ct. at 2747, 77 L.Ed. 2d at 255. From this language it is clear that due process would prevent a state from explicitly making the murder of a white victim an aggravating circumstance in capital sentencing. But where the statute is facially neutral, a due process claim must be supported by proof that a state, through its prosecutors, jurors, and judges, has implicitly attached the aggravating label to race.

Even if petitioner had characterized his claim as one under the due process clause, it would not have altered the legal standard governing the showing he must make to prevail. The application of the due process clause

is "an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and they by assessing the several interests that are at stake." *Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 2158-2159, 68 L.Ed.2d 640 (1981). Due process also requires the assessment of the risk that the procedures being used will lead to erroneous decisions. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Where a due process claim requires a court to determine whether the race of the victim impermissibly affected the capital sentencing process, decisions under the equal protection clause, characterized as "central to the Fourteenth Amendment's prohibition of discriminatory action by the State," *Rose v. Mitchell*, 443 U.S. 545, 554-55, 99 S.Ct. 2993, 2999-3000, 61 L.Ed.2d 739 (1979), are certainly "relevant precedents" in the assessment of the risk of erroneous decisions. Thus, as in the equal protection context, the claimant under a due process theory must present evidence which establishes that in the capital sentencing process race "is a motivating factor in the decision." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977).

Due process and cruel and unusual punishment cases do not normally focus on the intent of the governmental actor. But where racial discrimination is claimed not on the basis of procedural faults or flaws in the structure of the law, but on the basis of the decisions made within that process, then purpose, intent and motive are a natural component of the proof that discrimination actually occurred.

The Supreme Court has clearly held that to prove a constitutional claim of racial discrimination in the equal protection context, intent, purpose, and motive are necessary components. *Washington v. Davis*, 426 U.S. 229, 238-42, 96 S.Ct. 2040, 2046-49, 48 L.Ed.2d 597

(1976). A showing of a disproportionate impact alone is not sufficient to prove discriminatory intent unless no other reasonable inference can be drawn. *Arlington Heights*, 429 U.S. at 264-66, 97 S.Ct. at 562-64. This Circuit has consistently applied these principles of law. *Adams v. Wainwright*, 709 F.2d 1443, 1449 (11th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); *Sullivan v. Wainwright*, 721 F.2d 316, 317 (11th Cir. 1983).

We, therefore, hold that proof of a disparate impact alone is insufficient to invalidate a capital sentencing system, unless that disparate impact is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimination—*i.e.*, race is intentionally being used as a factor in sentencing—can be presumed to permeate the system.

#### *Generalized Statistical Studies and the Constitutional Standard*

The question initially arises as to whether any statewide study suggesting a racial disparity in the application of a state's death penalty could ever support a constitutional attack on a defendant's sentence. The answer lies in whether the statistical study is sufficient evidence of the ultimate fact which must be shown.

In *Smith v. Balkcom*, 671 F.2d 858, 859 (5th Cir. Unit B), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982), this Court said:

In some instances, circumstantial or statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose.

This statement has apparently caused some confusion because it is often cited as a proposition for which it does



not stand. Petitioner argues that his statistical study shows a strong inference that there is a disparity based on race. That is only the first step, however. The second step focuses on how great the disparity is. Once the disparity is proven, the question is whether that disparity is sufficient to compel a conclusion that it results from discriminatory intent and purpose. The key to the problem lies in the principle that the proof, no matter how strong, of some disparity is alone insufficient.

In *Spinkellink v. Wainwright*, 578 F.2d 582, 612 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), the petitioner claimed the Florida statute was being applied in a discriminatory fashion against defendants murdering whites, as opposed to blacks, in violation of the cruel and unusual punishment and equal protection components of the Constitution. Evidence of this disparity was introduced through expert witnesses. The court assumed for sake of argument the accuracy of petitioner's statistics but rejected the Eighth Amendment argument. The court rejected the equal protection argument because the disparity shown by petitioner's statistics could not prove racially discriminatory intent or purpose as required by *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), 578 F.2d at 614-16.

In *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984), the court, in denying an evidentiary hearing, accepted statistics which arguably tended to support the claim that the Florida death penalty was imposed disproportionately in cases involving white victims. The court then said:

Disparate impact alone is insufficient to establish a violation of the fourteenth amendment. There must be a showing of an intent to discriminate. . . . Only

if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination will it alone suffice.

709 F.2d at 1449 (citations omitted). Here again, in commencing on the strength of the evidence, the court was referring not to the amount or quality of evidence which showed a disparate impact, but the amount of disparate impact that would be so strong as to lead inevitably to a finding of motivation and intent, absent some other explanation for the disparity.

In commenting on the proffer of the Baldus study in another case, Justice Powell wrote in dissent from a stay of execution pending *en banc* consideration of this case:

If the Baldus study is similar to the several studies filed with us in *Sullivan v. Wainwright*, — U.S. —, 104 S.Ct. 90, 78 L.Ed.2d 266 (1983), the statistics in studies of this kind, many of which date as far back as 1948, are merely general statistical surveys that are hardly *particularized* with respect to any alleged "intentional" racial discrimination. Surely, no contention can be made that the entire Georgia judicial system, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statutes addressed in *Furman v. Georgia*, 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972). As our subsequent cases make clear, such arguments cannot be taken seriously under statutes approved in *Gregg*.

*Stephens v. Kemp*. — U.S. —, — n. 2, 104 S.Ct. 562, 564 n. 2, 78 L.Ed.2d 370, 374 n. 2 (1984) (Powell, J., dissenting).

The lesson from these and other cases must be that generalized statistical studies are of little use in deciding whether a particular defendant has been unconstitutionally sentenced to death. As to whether the system can

survive constitutional attack, statistical studies at most are probative of how much disparity is present, but it is a legal question as to how much disparity is required before a federal court will accept it as evidence of the constitutional flaws in the system.

This point becomes especially critical to a court faced with a request for an evidentiary hearing to produce future studies which will undoubtedly be made. Needless to say, an evidentiary hearing would be necessary to hear any evidence that a particular defendant was discriminated against because of his race. But general statistical studies of the kind offered here do not even purport to prove that fact. Aside from that kind of evidence, however, it would not seem necessary to conduct a full evidentiary hearing as to studies which do nothing more than show an unexplainable disparity. Generalized studies would appear to have little hope of excluding every possible factor that might make a difference between crimes and defendants, exclusive of race. To the extent there is a subjective or judgmental component to the discretion with which a sentence is investigated, not only will no two defendants be seen identical by the sentencers, but no two sentencers will see a single case precisely the same. As the court has recognized, there are "countless racially neutral variables" in the sentencing of capital cases. *Smith v. Balkcom*, 617 F.2d at 859.

This is not to recede from the general proposition that statistical studies may reflect a disparity so great as to inevitably lead to a conclusion that the disparity results from intent or motivation. As decided by this opinion, the Baldus studies demonstrate that the Georgia system does not contain the level of disparity required to meet that constitutional standard.

### *Validity of the Baldus Study*

The social science research of Professor Baldus purports to reveal, through statistical analysis, disparities in the sentencing of black defendants in white victim

cases in Georgia. A study is valid if it measures what it purports to measure. Different studies have different levels of validity. The level of the validity of the study is directly related to the degree to which the social scientist can rely on the findings of the study as measuring what it claims to measure.

The district court held the study to be invalid because of perceived errors in the data base, the deficiencies in the models, and the multi-collinearity existing between the independent variables. We hold in this case that even if the statistical results are accepted as valid, the evidence fails to challenge successfully the constitutionality of the Georgia system. Because of this decision, it is not necessary for us to determine whether the district court was right or wrong in its faulting of the Baldus study.

The district court undertook an extensive review of the research presented. It received, analyzed and dealt with the complex statistics. The district court is to be commended for its outstanding endeavor in the handling of the detailed aspects of this case, particularly in light of the consistent arguments being made in several cases based on the Baldus study. Any decision that the results of the Baldus study justify habeas corpus relief would have to deal with the district court's findings as to the study itself. Inasmuch as social science research has been used by appellate courts in decisionmaking, *Muller v. Oregon*, 208 U.S. 412, 419-21, 28 S.Ct. 324, 325-26, 52 L.Ed. 551 (1980), and has been tested like other kinds of evidence at trial, see *Spinkellink v. Wainwright*, 578 F.2d 582, 612-13 (5th Cir.1978), there is a question as to the standard of review of a trial court's finding based on a highly complex statistical study.

Findings of fact are reviewed under the clearly erroneous standard which the Supreme Court has defined as: "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and

firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

Whether a disparate impact reflects an intent to discriminate is an ultimate fact which must be reviewed under the clearly erroneous standard. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). In *Pullman*, the Supreme Court said that Fed.R.Civ.P. 52(a)

does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts.

456 U.S. at 287, 102 S.Ct. at 1789.

There would seem to be two levels of findings based on statistical evidence that must be reviewed: *first*, the finding concerning the validity of the study itself, and *second*, the finding of ultimate fact based upon the circumstantial evidence revealed by the study, if valid.

The district court here found the study invalid. The court found the statistics of the study to be particularly troublesome in the areas of the data base, the models, and the relationship between the independent variables. *McCleskey v. Zant*, 580 F.Supp. 338, 379 (N.D.Ga.1984). We pretermitted a review of this finding concerning the validity of the study itself. The district court went on to hold that even if the statistics did validly reflect the Georgia system, the ultimate fact of intent to discriminate was not proven. We review this finding of fact by assuming the validity of the study and rest our holding on the decision that the study, even if valid, not only supports the district judge's decision under the clearly erroneous standard of review, but compels it.



*Sufficiency of Baldus Study*

McCleskey argues that, although the post-*Furman* statute in Georgia now yields more predictable results, the race of the victim is a significant, but of course impermissible, factor which accounts for the imposition of the death penalty in many cases. He supports this argument with the sophisticated Baldus statistical study that, after controlling for the legitimate factors that might rationally explain the imposition of the penalty, purportedly reveals significant race-of-the-victim influence in the system; *i.e.*, all other things being equal, white victim crimes are more likely to result in the penalty. Because the Constitution prohibits the consideration of racial factors as justification for the penalty, McCleskey asserts that the discernible racial influence on sentencing renders the operation of the Georgia system infirm.

In addition, McCleskey asserts that the race-of-the-victim influence on the system is particularly significant in the range of cases involving intermediate levels of aggravation (mid-range aggravation cases). He argues that because his case fell within that range, he has established that impermissible racial considerations operated in his case.

We assume without deciding that the Baldus study is sufficient to show what it purports to reveal as to the application of the Georgia death penalty. Baldus concluded that his study showed that systematic and substantial disparities existed in the penalties imposed upon homicide defendants in Georgia based on race of the homicide victim, that the disparities existed at a less substantial rate in death sentencing based on race of defendants, and that the factors of race of the victim and defendant were at work in Fulton County.

A general comment about the limitations on what the Baldus study purports to show, although covered in the subsequent discussion, may be helpful. The Baldus study statistical evidence does not purport to show that Mc-

Cleskey was sentenced to death because of either his race or the race of his victim. It only shows that in a group involving blacks and whites, all of whose cases are virtually the same, there would be more blacks receiving the death penalty than whites and more murderers of whites receiving the death penalty than murderers of blacks. The statisticians' "best guess" is that race was a factor in those cases and has a role in sentencing structure in Georgia. These general statements about the results are insufficient to make a legal determination. An analysis must be made as to how much disparity is actually shown by the research.

Accepting the Baldus figures, but not the general conclusion, as accurately reflecting the Georgia experience, the statistics are inadequate to entitle McCleskey to relief on his constitutional claim.

The Georgia-based retrospective study consisted of a stratified random sample of 1,066 cases of individuals indicted for murder-death, murder-life and voluntary manslaughter who were arrested between March 28, 1973 and December 31, 1978. The data were compiled from a 41-page questionnaire and consisted of more than 500,000 entries. Through complex statistical analysis, Baldus examined relationships between the dependent variable, death-sentencing rate, and independent variables, nine aggravating and 75 mitigating factors, while controlling for background factors. In 10% of the cases a penalty trial was held, and in 5% of the cases defendants were sentenced to death.

The study subjects the Georgia data to a multitude of statistical analyses, and under each method there is a statistically significant race-of-the-victim effect operating statewide. It is more difficult, however, to ascertain the magnitude of the effect demonstrated by the Baldus study. The simple, unadjusted figures show that death sentences were imposed in 11% of the white victim cases potentially eligible for the death penalty, and in 1% of the eligible black victim cases. After controlling for various

legitimate factors that could explain the differential, Baldus still concluded that there was a significant race-of-the-victim effect. The result of Baldus' most conclusive model, on which McCleskey primarily relies, showed an effect of .06, signifying that on average a white victim crime is 6% more likely to result in the sentence than a comparable black victim crime. Baldus also provided tables that showed the race-of-the-victim effect to be most significant in cases involving intermediate levels of aggravation. In these cases, on average, white victim crimes were shown to be 20% more likely to result in the death penalty than equally aggravated black victim crimes.

None of the figures mentioned above is a definitive quantification of the influence of the victim's race on the overall likelihood of the death penalty in a given case. Nevertheless, the figures all serve to enlighten us somewhat on how the system operates. The 6% average figure is a composite of all cases and contains both low aggravation cases, where the penalty is almost never imposed regardless of the victim's race, and high aggravation cases, where both white and black victim crimes are likely to result in the penalty. When this figure is related to tables that classify cases according to the level of aggravation, the 6% average figure is properly seen as an aggregate containing both cases in which race of the victim is a discernible factor and those in which it is not.

McCleskey's evidence, and the evidence presented by the state, also showed that the race-of-the-victim factor diminishes as more variables are added to the model. For example, the bottom line figure was 17% in the very simple models, dropped to 6% in the 230-variable model, and finally fell to 4% when the final 20 variables were added and the effect of Georgia Supreme Court review was considered.

The statistics are also enlightening on the overall operation of the legitimate factors supporting the death

sentence. The Baldus study revealed an essentially rational system, in which high aggravation cases were more likely to result in the death sentence than low aggravation cases. As one would expect in a rational system, factors such as torture and multiple victims greatly increased the likelihood of receiving the penalty.

There are important dimensions that the statistics cannot reveal. Baldus testified that the Georgia death penalty system is an extremely complicated process in which no single factor or group of factors determines the outcome of a given case. No single petitioner could, on the basis of these statistics alone, establish that he received the death sentence because, and only because, his victim was white. Even in the mid-range of cases, where the race-of-the-victim influence is said to be strong, legitimate factors justifying the penalty are, by the very definition of the mid-range, present in each case.

The statistics show there is a race-of-the-victim relationship with the imposition of the death sentence discernible in enough cases to be statistically significant in the system as a whole. The magnitude cannot be called determinative in any given case.

The evidence in the Baldus study seems to support the Georgia death penalty system as one operating in a rational manner. Although no single factor, or combination of factors, will irrefutably lead to the death sentence in every case, the system in operation follows the pattern the legislature intended, which the Supreme Court found constitutional in *Gregg*, and sorts out cases according to levels of aggravation, as gauged by legitimate factors. The fundamental Eighth Amendment concern of *Furman*, as discussed in *Gregg*, which states that "there is no meaningful basis for distinguishing the few cases in which [the death sentence] is imposed from the many in which it is not" does not accurately describe the operation of the Georgia statute. 428 U.S. at 188, 96 S.Ct. at 2932.



Taking the 6% bottom line revealed in the Baldus figures as true, this figure is not sufficient to overcome the presumption that the statute is operating in a constitutional manner. In any discretionary system, some imprecision must be tolerated, and the Baldus study is simply insufficient to support a ruling, in the context of a statute that is operating much as intended, that racial factors are playing a role in the outcome sufficient to render the system as a whole arbitrary and capricious.

This conclusion is supported, and possibly even compelled, by recent Supreme Court opinions in *Sullivan v. Wainwright*, — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983) (denying stay of execution to allow evidentiary hearing on Eighth Amendment claim supported by statistics); *Wainwright v. Adams*, — U.S. —, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984) (vacating stay); and *Wainwright v. Ford*, — U.S. —, 104 S.Ct. 3498, 82 L.Ed.2d. 911 (1984) (denying state's application to vacate stay on other grounds). A plurality of the Court in *Ford* definitively stated that it had held "in two prior cases that the statistical evidence relied upon by Ford to support his claim of discrimination was not sufficient to raise a substantial ground upon which relief might be granted." *Id.* at —, 104 S.Ct. at 3499, 82 L.Ed.2d at 912 (citing *Sullivan* and *Adams*, and *Ford* all relied on the study by Gross and Mauro of the Florida death penalty system. The bottom line figure in the Gross and Mauro study indicated a race-of-the-victim effect, quantified by a "death odds multiplier," of about 4.8 to 1. Using a similar methodology, Baldus obtained a death odds multiplier of 4.3 to 1 in Georgia.

It is of course possible that the Supreme Court was rejecting the methodology of the Florida study, rather than its bottom line. It is true that the methodology of the Baldus study is superior. The posture of the Florida cases, however, persuades this Court that the Supreme Court was not relying on inadequacies in the methodology of the Florida study. The issue in *Sullivan*, *Adams*, and



*Ford* was whether the petitioner's proffer had raised a substantial ground sufficient to warrant an evidentiary hearing. In that context, it is reasonable to suppose that the Supreme Court looked at the bottom line indication of racial effect and held that it simply was insufficient to state a claim. A contrary assumption, that the Supreme Court analyzed the extremely complicated Gross and Mauro study and rejected it on methodological grounds, is much less reasonable.

Thus, assuming that the Supreme Court in *Sullivan*, *Adams* and *Ford* found the bottom line in the Gross and Mauro study insufficient to raise a constitutional claim, we would be compelled to reach the same result in analyzing the sufficiency of the comparable bottom line in the Baldus study on which McCleskey relies.

McCleskey's argument about the heightened influence of the race-of-the-victim factor in the mid-range of cases, requires a somewhat different analysis. McCleskey's case falls within the range of cases involving intermediate levels of aggravation. The Baldus statistical study tends to show that the race-of-the-victim relationship to sentencing outcome was greater in these cases than in cases involving very low or very high levels of aggravation.

The race-of-the-victim effect increases the likelihood of the death penalty by approximately 20% in the mid-range of cases. Some analysis of this 20% figure is appropriate.

The 20% figure in this case is not analogous to a figure reflecting the percentage disparity in a jury composition case. Such a figure represents the *actual* disparity between the number of minority persons on the jury venire and the number of such persons in the population. In contrast, the 20% disparity in this case does not purport to be an actual disparity. Rather, the figure reflects that the variables included in the study do not adequately explain the 20% disparity and that the statisticians can explain it only by assuming the racial effect. More im-

portantly, Baldus did not testify that he found statistical significance in the 20% disparity figure for mid-range cases, and he did not adequately explain the rationale of his definition of the mid-range of cases. His testimony leaves this Court unpersuaded that there is a rationally classified, well-defined class of cases in which it can be demonstrated that a race-of-the-victim effect is operating with a magnitude approximating 20%.

Assuming *arguendo*, however, that the 20% disparity is an accurate figure, it is apparent that such a disparity only in the mid-range cases, and not in the system as a whole, cannot provide the basis for a system-wide challenge. As previously discussed, the system as a whole is operating in a rational manner, and not in a manner that can fairly be labeled arbitrary or capricious. A valid system challenge cannot be made only against the mid-range of cases. Baldus did not purport to define the mid-range of cases; nor is such a definition possible. It is simply not satisfactory to say that the racial effect operates in "close cases" and therefore that the death penalty will be set aside in "close cases."

As discussed previously, the statistics cannot show that the race-of-the-victim factor operated in a given case, even in the mid-range. Rather, the statistics show that, on average, the race-of-the-victim factor was more likely to affect the outcome in mid-range cases than in those cases at the high and low ends of the spectrum of aggravation. The statistics alone are insufficient to show that McCleskey's sentence was determined by the race of his victim, or even that the race of his victim contributed to the imposition of the penalty in this case.

McCleskey's petition does not surmount the threshold burden of stating a claim on this issue. Aside from the statistics, he presents literally no evidence that might tend to support a conclusion that the race of McCleskey's victim in any way motivated the jury to impose the death sentence in his case.

### Conclusion

The Supreme Court has held that to be constitutional the sentencer in death sentence cases must have some measure of discretion. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The mandatory death sentence statutes were declared unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

The very exercise of discretion means that persons exercising discretion may reach different results from exact duplicates. Assuming each result is within the range of discretion, all are correct in the eyes of the law. It would not make sense for the system to require the exercise of discretion in order to be facially constitutional, and at the same time hold a system unconstitutional in application where that discretion achieved different results for what appear to be exact duplicates, absent the state showing the reasons for the difference. The discretion is narrow, focused and directed, but still there is a measure of discretion.

The Baldus approach, however, would take the case with different results on what are contended to be duplicate facts, where the differences could not be otherwise explained, and conclude that the different result was based on race alone. From a legal perspective, petitioner would argue that since the difference is not explained by facts which the social scientist thinks satisfactory to explain the differences, there is a *prima facie* case that the difference was based on unconstitutional factors, and the burden would shift to the state to prove the difference in results from constitutional considerations. This approach ignores the realities. It not only ignores quantitative differences in cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few, but it is incapable of measuring qualitative differences of such things as aggravating and mitigating factors. There are, in fact, no exact duplicates in capital

crimes and capital defendants. The type of research submitted here tends to show which of the directed factors were effective, but is of restricted use in showing what undirected factors control the exercise of constitutionally required discretion.

It was recognized when *Gregg* was decided that the capital justice system would not be perfect, but that it need not be perfect in order to be constitutional. Justice White said:

Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder.

*Gregg v. Georgia*, 428 U.S. 153, 226, 96 S.Ct. 2909, 2949, 49 L.Ed.2d 859 (1976) (White, J., concurring).

The plurality opinion of the *Gregg* Court noted:

The petitioner's argument is nothing more than a veiled contention that *Furman* indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant. If a jury refused to convict even though the evidence supported the charge, its verdict

would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury nullification would not be permitted. Finally, acts of executive clemency would have to be prohibited. Such a system, of course, would be totally alien to our notions of criminal justice.

*Id.* at 199 n. 50, 96 S.Ct. at 2937 n. 50 (opinion of Stewart<sup>+</sup>, Powell, and Stevens, JJ.).

Viewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system. In a state where past discrimination is well documented, the study showed no discrimination as to the race of the defendant. The marginal disparity based on the race of the victim tends to support the state's contention that the system is working far differently from the one which *Furman* condemned. In pre-*Furman* days, there was no rhyme or reason as to who got the death penalty and who did not. But now, in the vast majority of cases, the reasons for a difference are well documented. That they are not so clear in a small percentage of the cases is no reason to declare the entire system unconstitutional.

The district court properly rejected this aspect of McCleskey's claim.

### INEFFECTIVE ASSISTANCE OF COUNSEL

McCleskey contends his trial counsel rendered ineffective assistance at both guilt/innocence and penalty phases of his trial in violation of the Sixth Amendment.

Although a defendant is constitutionally entitled to reasonably effective assistance from his attorney, we hold that McCleskey has not shown he was prejudiced by the claimed defaults in his counsel's performance. Ineffective assistance warrants reversal of a conviction only when there is a reasonable probability that the attorney's errors altered the outcome of the proceeding. A court may decide an ineffectiveness claim on the ground



of lack of prejudice without considering the reasonableness of the attorney's performance. *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

As to the guilt phase of his trial, McCleskey claims that his attorney failed to: (1) interview the prisoner who testified that McCleskey gave a jail house confession; (2) interview and subpoena as defense witnesses the victims of the Dixie Furniture Store robbery; and (3) interview the State's ballistics expert.

McCleskey demonstrates no prejudice caused by his counsel's failure to interview Offie Evans. We have held there was no reasonable likelihood that the disclosure of the detective's statement to Offie Evans would have affected the verdict. There is then no "reasonable probability" that the attorney's failure to discover this evidence affected the verdict.

As to the robbery victims, McCleskey does not contend that an in-person interview would have revealed something their statements did not. He had an opportunity to cross-examine several of the robbery victims and investigating officers at McCleskey's preliminary hearing. The reasonableness of the attorney's investigation need not be examined because there was obviously no prejudice.

The question is whether it was unreasonable not to subpoena the robbery victims as defense witnesses. McCleskey's attorney relied primarily on an alibi defense at trial. To establish this defense, the attorney put McCleskey on the stand. He also called several witnesses in an attempt to discredit a Dixie Furniture Store employee's identification of McCleskey and to show that McCleskey's confession was involuntary. It would have undermined his defense if the attorney had called witnesses to testify as to which robber did the shooting. No prejudice can be shown by failing to subpoena witnesses as a reasonable strategy decision.

McCleskey's attorney could have reasonably prepared to cross-examine the State's ballistics expert by reading the expert's report. No in-person interview was necessary. See *Washington v. Watkins*, 655 F.2d 1346, 1358 (5th Cir.1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). The report was in the prosecutor's file which the attorney reviewed and no contention has been made that he did not read it.

As to the sentencing phase of his trial, McCleskey asserts his attorney failed to investigate and find character witnesses and did not object to the State's introduction of prior convictions which had been set aside.

No character witnesses testified for McCleskey at his trial. At the State habeas corpus hearing McCleskey's attorney testified he talked with both McCleskey and his sister about potential character witnesses. They suggested no possibilities. The sister refused to testify and advised the attorney that their mother was too sick to travel to the site of the trial. McCleskey and his sister took the stand at the State habeas corpus hearing and told conflicting stories. It is clear from the state court's opinion that it believed the attorney:

Despite the conflicting evidence on his point, . . . the Court is authorized in its role as fact finder to conclude that Counsel made all inquiries necessary to present an adequate defense during the sentencing phase. Indeed, Counsel could not present evidence that did not exist.

Although this "finding of fact" is stated in terms of the ultimate legal conclusion, implicit in that conclusion is the historical finding that the attorney's testimony was credible. See *Paxton v. Jarvis*, 735 F.2d 1306, 1308 (11th Cir.1984); *Cox v. Montgomery*, 718 F.2d 1036 (11th Cir.1983). This finding of fact is entitled to a presumption of correctness. Based on the facts as testified to by the attorney, he conducted a reasonable investigation for the character witnesses.

As evidence of an aggravating circumstance the prosecutor introduced three convictions resulting in life sentences, all of which had been set aside on Fourth Amendment grounds. This evidence could not result in any undue prejudice, because although the convictions were overturned, the charges were not dropped and McCleskey pleaded guilty and received sentences of 18 years. The reduction in sentence was disclosed at trial.

The district court properly denied relief on the ineffectiveness of counsel claim.

### DEATH-ORIENTED JURY

Petitioner claims the district court improperly upheld the exclusion of jurors who were adamantly opposed to capital punishment. According to petitioner, this exclusion violated his right to be tried by an impartial and unbiased jury drawn from a representative cross-section of his community. In support of this proposition, petitioner cites two district court opinions from outside circuits. *Grigsby v. Mabry*, 569 F.Supp. 1273 (E.D. Ark.1983), *hearing en banc ordered*, No. 83-2113 E.A. (8th Cir. Nov. 8, 1983), *argued* (March 15, 1984) and *Keeten v. Garrison*, 578 F.Supp. 1164 (W.D.N.C.1984), *rev'd*, 742 F.2d 129 (4th Cir.1984). Whatever the merits of those opinions, they are not controlling authority for this Court.

Because both jurors indicated they would not under any circumstances consider imposing the death penalty, they were properly excluded under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). See also *Boulden v. Holman*, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969). Their exclusion did not violate petitioner's Sixth Amendment rights to an impartial, community-representative jury. *Smith v. Balkcom*, 660 F.2d 573, 582-83 (5th Cir. Unit B 1981), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); *Spinkellink v. Wainwright*, 578 F.2d 582, 593-94 (5th

Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d.

### THE SANDSTROM ISSUE

The district court rejected McCleskey's claim that the trial court's instructions to the jury on the issue of intent deprived him of due process by shifting from the prosecution to the defense the burden of proving beyond a reasonable doubt each essential element of the crimes for which he was tried. Such burden-shifting is unconstitutional under *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

McCleskey objects to the following portion of the trial court's instruction to the jury:

One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.

In its analysis of whether this instruction was unconstitutional under *Sandstrom*, the district court examined two recent panel opinions of this Circuit, *Franklin v. Francis*, 720 F.2d 1206 (11th Cir.1983), *cert. granted*, — U.S. — 104 S.Ct. 2677, 81 L.Ed.2d 873 (1984), and *Tucker v. Francis*, 723 F.2d 1504 (11th Cir.), *on pet. for reh'g and reh'g en banc*, 723 F.2d 1518 (11th Cir.1984). Even though the jury instructions in the two cases were identical, *Franklin* held that the language created a mandatory rebuttable presumption violative of *Sandstrom* while *Tucker* held that it created no more than a permissive inference and did not violate *Sandstrom*. Noting that the challenged portion of the instruction used at McCleskey's trial was "virtually identical" to the corresponding portions of the charges in *Franklin* and *Tucker*, the district court elected to follow *Tucker* as this Court's most recent pronouncement on the

issue, and it held that *Sandstrom* was not violated by the charge of intent.

Since the district court's decision, the en banc court has heard argument in several cases in an effort to resolve the constitutionality of potentially burden-shifting instructions identical to the one at issue here. *Davis v. Zant*, 721 F.2d 1478 (11th Cir.1983), *on pet. for reh'g and reh'g en banc*, 728 F.2d 492 (11th Cir.1984); *Drake v. Francis*, 727 F.2d 990 (11th Cir.), *on pet. for reh'g and for reh'g en banc*, 727 F.2d 1003 (11th Cir.1984); *Tucker v. Francis*, 723 F.2d 1504 (11th Cir.), *on pet. for reh'g and reh'g en banc*, 723 F.2d 1518 (11th Cir.1984). The United States Supreme Court has heard oral argument in *Franklin v. Francis*, 53 U.S.L.W. 3373 (U.S. Nov. 20, 1984) [No. 83-1590]. However these cases are decided, for the purpose of this decision, we assume here that the intent instruction in this case violated *Sandstrom* and proceed to the issue of whether that error was harmless.

The Supreme Court requires that "before a federal constitutional error can be harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). More recently, the Supreme Court has divided over the issue of whether the doctrine of harmless error is ever applicable to burden-shifting presumptions violative of *Sandstrom*. Reasoning that "[a]n erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence," a four-justice plurality held that one of the two tests for harmless error employed by this Circuit—whether the evidence of guilt is so over-whelming that the erroneous instruction could not have contributed to the jury's verdict—is inappropriate. *Connecticut v. Johnson*, 460 U.S. 73, 85-87, 103 S.Ct. 969, 976-978, 74 L.Ed.2d 823 (1983). The fifth vote to affirm was added by Justice Stevens, who



concurred on jurisdictional grounds. *Id.* at 88, 103 S.Ct. at 978 (Stevens, J., concurring in the judgment). Four other justices, however, criticized the plurality for adopting an "automatic reversal" rule for *Sandstrom* error. *Id.* at 98, 103 S.Ct. at 983 (Powell, J., dissenting). The Supreme Court has subsequently reviewed another case in which harmless error doctrine was applied to a *Sandstrom* violation. The Court split evenly once again in affirming without opinion a Sixth Circuit decision holding that "the prejudicial effect of a *Sandstrom* instruction is largely a function of the defense asserted at trial." *Engle v. Koehler*, 707 F.2d 241, 246 (6th Cir.1983), *aff'd by an equally divided court*, — U.S. —, 104 S.Ct. 1673, 80 L.Ed.2d 1 (1984) (*per curiam*). In *Engle*, the Sixth Circuit distinguished between *Sandstrom* violations where the defendant has claimed nonparticipation in the crime and those where the defendant has claimed lack of *mens rea*, holding that only the latter was so prejudicial as never to constitute harmless error. *Id.* Until the Supreme Court makes a controlling decision on the harmless error question, we continue to apply the standards propounded in our earlier cases.

Since *Sandstrom* was decided in 1979, this Circuit has analyzed unconstitutional burden-shifting instructions to determine whether they constituted harmless error. See, e.g., *Mason v. Balkcom*, 669 F.2d 222, 227 (5th Cir. Unit B 1982). In *Lamb v. Jernigan*, 683 F.2d 1332 (11th Cir.1982), *cert. denied*, 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983), the Court identified two situations in which an unconstitutional burden-shifting instruction might be harmless. First, an erroneous instruction may have been harmless if the evidence of guilt was so overwhelming that the error could not have contributed to the jury's decision to convict. *Lamb*, 683 F.2d at 1342; *Mason*, 669 F.2d at 227. In the case before us, the district court based its finding that the *Sandstrom* violation was harmless on this ground. This Circuit has decided on several occasions that overwhelming evidence

of guilt renders a *Sandstrom* violation harmless. See *Jarrell v. Balkcom*, 735 F.2d 1242, 1257 (11th Cir.1984); *Brooks v. Francis*, 716 F.2d 780, 793-94 (11th Cir.1983), *on pet. for reh'g and for reh'g en banc*, 728 F.2d 1358 (11th Cir.1984); *Spencer v. Zant*, 715 F.2d 1562, 1578 (11th Cir.1983), *on pet. for reh'g and for reh'g en banc*, 729 F.2d 1293 (11th Cir.1984).

Second, the erroneous instruction may be harmless where the instruction shifts the burden on an element that is not at issue at trial. *Lamb*, 683 F.2d at 1342. This Circuit has adopted this rationale to find a *Sandstrom* violation harmless. See *Drake v. Francis*, 727 F.2d 990, 999 (11th Cir.), *on pet. for reh'g and for reh'g en banc*, 727 F.2d 1003 (11th Cir.1984); *Collins v. Francis*, 728 F.2d 1322, 1330-31 (11th Cir.1984), *pet for reh'g en banc denied*, 734 F.2d 1481 (11th Cir.1984). There is some indication that even the plurality in *Connecticut v. Johnson* would endorse this type of harmless error in limited circumstances:

[A] *Sandstrom* error may be harmless if the defendant conceded the issue of intent. . . . In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless.

460 U.S. at 87, 103 S.Ct. at 978 (citations omitted).

Our review of the record reveals that the *Sandstrom* violation in this case is rendered harmless error under this second test. Before discussing whether intent was at issue in McCleskey's trial, however, we note that intent is an essential element of the crime with which he was charged. Georgia law provides three essential elements to the offense of malice murder: (1) a homicide; (2) malice aforethought; and (3) unlawfulness. *Lamb v. Jernigan*, 683 F.2d at 1336. The "malice" element means the in-

tent to kill in the absence of provocation. *Id.* The erroneous instruction on intent, therefore, involved an essential element of the criminal offense charged, and the state was required to prove the existence of that element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). The question therefore becomes whether McCleskey conceded the element of intent by presenting a defense that admits that the act alleged was intentional.

Of course, a defendant in a criminal trial may rely entirely on the presumption of innocence and the State's burden of proving every element of the crime beyond a reasonable doubt. *Connecticut v. Johnson*, 460 U.S. at 87 n. 16, 103 S.Ct. at 978 n.16. In such a case, determining whether a defendant had conceded the issue of intent might well be impossible. The record reveals, however, that McCleskey chose not to take that course. Rather, he took the stand at trial and testified that he was not a participant in the Dixie Furniture Store robbery which resulted in the killing of Officer Schlatt. The end of McCleskey's testimony on direct examination summarizes his alibi defense:

Q. Were you at the Dixie Furniture Store that day?

A. No.

Q. Did you shoot anyone?

A. No, I didn't.

Q. Is everything you have said the truth?

A. Positive.

In closing argument, McCleskey's attorney again stressed his client's alibi defense. He concentrated on undermining the credibility of the eyewitness identifications that pinpointed McCleskey as the triggerman and on questioning the motive of the other robbery participants who had testified that McCleskey had fired the fatal shots. McCleskey's attorney emphasized that

if Mr. McCleskey was in the front of the store and Mr. McCleskey had the silver gun and if the silver gun killed the police officer, then he would be guilty. But that is not the circumstances that have been proven.

Although McCleskey's attorney's arguments were consistent with the alibi testimony offered by McCleskey himself, the jury chose to disbelieve that testimony and rely instead on the testimony of eyewitnesses and the other participants in the robbery.

We therefore hold that in the course of asserting his alibi defense McCleskey effectively conceded the issue of intent, thereby rendering the *Sandstrom* violation harmless beyond a reasonable doubt. In so holding, we do not imply that whenever a defendant raises a defense of alibi a *Sandstrom* violation on an intent or malice instruction is automatically rendered harmless error. Nor do we suggest that defendant must specifically argue that intent did not exist in order for the issue of intent to remain before the jury. But where the State has presented overwhelming evidence of an intentional killing and where the defendant raises a defense of nonparticipation in the crime rather than lack of *mens rea*, a *Sandstrom* violation on an intent instruction such as the one at issue here is harmless beyond a reasonable doubt. See *Collins v. Francis*, 728 F.2d at 1331; *Engle v. Koehler*, 707 F.2d at 246.

In this case the officer entered and made it almost to the middle of the store before he was shot twice with a .38 caliber Rossi revolver. The circumstances of this shooting, coupled with McCleskey's decision to rely on an alibi defense, elevate to mere speculation any scenario that would create a reasonable doubt on the issue of intent. The district court properly denied habeas corpus relief on this issue.

## CONCLUSION

The judgment of the district court in granting the petition for writ of habeas corpus is reversed and the petition is hereby denied.

REVERSED and RENDERED.

TJOFLAT, Circuit Judge, concurring:

I concur in the court's opinion, though I would approach the question of the constitutional application of the death penalty in Georgia somewhat differently. I would begin with the established proposition that Georgia's capital sentencing model is facially constitutional. It contains the safeguards necessary to prevent arbitrary and capricious decision making, including decisions motivated by the race of the defendant or the victim. These safeguards are present in every stage of a capital murder prosecution in Georgia, from the grand jury indictment through the execution of the death sentence. Some of these safeguards are worth repeating.

At the indictment stage, the accused can insist that the State impanel a grand jury that represents a fair cross section of the community, as required by the sixth and fourteenth amendments, and that the State not deny a racial group, in violation of the equal protection clause of the fourteenth amendment, the right to participate as jurors. In Georgia this means that a representative portion of blacks will be on the grand jury.

The same safeguards come into play in the selection of the accused's petit jury. In addition, the accused can challenge for cause any venireman found to harbor a racial bias against the accused or his victim. The accused can peremptorily excuse jurors suspected of such bias and, at the same time, prevent the prosecutor from exercising his peremptory challenges in a way that systematically excludes a particular class of persons, such as blacks, from jury service. *See, e.g., Willis v. Zant*, 720



F.2d 1212 (11th Cir.1983), *cert. denied*, — U.S.—, 104 S.Ct. 3548, 82 L.Ed. 851 (1984).

If the sentencer is the jury, as it is in Georgia (the trial judge being bound by the jury's recommendation) it can be instructed to put aside racial considerations in reaching its sentencing recommendation. If the jury recommends the death sentence, the accused, on direct appeal to the Georgia Supreme Court, can challenge his sentence on racial grounds as an independent assignment of error or in the context of proportionality review. And, if the court affirms his death sentence, he can renew his challenge in a petition for rehearing or by way of collateral attack.

In assessing the constitutional validity of Georgia's capital sentencing scheme, one could argue that the role of the federal courts—the Supreme Court on certiorari from the Georgia Supreme Court and the entire federal judicial system in habeas corpus review—should be considered. For they provide still another layer of safeguards against the arbitrary and capricious imposition of the death penalty.

Petitioner, in attacking his conviction and death sentence, makes no claim that either was motivated by a racial bias in any stage of *his* criminal prosecution. His claim stems solely from what has transpired in other homicide prosecutions. To the extent that his data consists of cases in which the defendant's conviction and sentence—whether a sentence to life imprisonment or death—is constitutionally unassailable, the data, I would hold, indicates no invidious racial discrimination as a matter of law. To the extent that the data consists of convictions and/or sentences that are constitutionally infirm, the data is irrelevant. In summary, petitioner's data, which shows nothing more than disproportionate sentencing results, is not probative of a racially discriminatory motive on the part of any of the participants in Georgia's death penalty sentencing model—either in petitioner's or any other case.

VANCE, Circuit Judge, concurring:

Although I concur in Judge Roney's opinion, I am troubled by its assertion that there is "little difference in the proof that might be required to prevail" under either eighth amendment or fourteenth amendment equal protection claims of the kind presented here<sup>1</sup> According to *Furman*, an eighth amendment inquiry centers on the general results of capital sentencing systems, and condemns those governed by such unpredictable factors as chance, caprice or whim. An equal protection inquiry is very different. It centers not on systemic irrationality, but rather the independent evil of intentional, invidious discrimination against given individuals.

I am conscious of the dicta in the various *Furman* opinions which note with disapproval the possibility that racial discrimination was a factor in the application of the death penalty under the Georgia and Texas statutes then in effect. To my mind, however, such dicta merely indicate the possibility that a system that permits the exercise of standardless discretion not only may be capricious, but may give play to discriminatory motives which violate equal protection standards as well. Whether a given set of facts make out an eighth amendment claim of systemic irrationality under *Furman* is, therefore, a question entirely independent of whether those facts establish deliberate discrimination violative of the equal protection clause.

I am able to concur because in neither the case before us nor in any of the others presently pending would the difference influence the outcome. As Judge Roney points out, petitioner's statistics are insufficient to establish intentional discrimination in the capital sentence imposed in his case. As to the eighth amendment, I doubt that a claim of arbitrariness or caprice is even presented, since petitioner's case is entirely devoted to proving that the

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<sup>1</sup> I have not addressed the due process analysis employed by the district court because the petitioner did not rely on it in his brief.

death penalty is being applied in an altogether explicable—albeit impermissible—fashion.

Claims such as that of petitioner are now presented with such regularity that we may reasonably hope for guidance from the Supreme Court by the time my expressed concerns are outcome determinative in a given case.

KRAVITCH, Circuit Judge, concurring:

I concur in the majority opinion except as to the *Giglio* issue. In my view, for reasons stated in Chief Judge Godbold's dissent, the facts surrounding Evans' testimony did constitute a *Giglio* violation. I agree with the majority, however, that any error was harmless beyond a reasonable doubt.

I also join Judge Anderson's special concurrence on the "Constitutional Application of the Georgia Death Penalty."

R. LANIER ANDERSON, III, Circuit Judge, concurring with whom KRAVITCH, Circuit Judge, joins as to the constitutional application of the Georgia Death Statute:

I join Judge Roney's opinion for the majority, and write separately only to emphasize, with respect to the Part entitled "Constitutional Application of Georgia's Death Penalty," that death is different in kind from all other criminal sanctions, *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed. 2d 944 (1976). Thus, the proof of racial motivation required in a death case, whether pursuant to an Eighth Amendment theory or an equal protection theory, presumably would be less strict than that required in civil cases or in the criminal justice system generally. Constitutional adjudication would tolerate less risk that a death sentence was influenced by race. The Supreme Court's Eighth Amendment jurisprudence has established a constitutional super-

vision over the conduct of state death penalty systems which is more exacting than that with respect to the criminal justice system generally *Woodson v. North Carolina*, *id.* at 305, 96 S.Ct. at 2991 ("Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment."). There is no need in this case, however, to reach out and try to define more precisely what evidentiary showing would be required. Judge Roney's opinion demonstrates with clarity why the evidentiary showing in this case is insufficient.

GODBOLD, Chief Judge, dissenting in part, and concurring in part, with whom JOHNSON, HATCHETT and CLARK, Circuit Judges, join as to the dissent on the *Giglio* issue \*:

At the merits trial Evans, who had been incarcerated with McCleskey, testified that McCleskey admitted to him that he shot the policeman and acknowledged that he wore makeup to disguise himself during the robbery. Evans also testified that he had pending against him a [federal] escape charge, that he had not asked the prosecutor to "fix" this charge, and that the prosecutor had not promised him anything to testify.

At the state habeas hearing the following transpired:

The Court: Mr. Evans, let me ask you a question. At the time that you testified in Mr. McCleskey's trial, had you been promised anything in exchange for your testimony?

The witness: No, I wasn't. I wasn't promised nothing about—I wasn't promised nothing by the D.A. But the Detective told me that he would—he said he was going to do it himself, speak a word for me. That was what the Detective told me.

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\* I dissent on only the *Giglio* issue. I concur in Judge Roney's opinion on all other issues.

By Mr. Stroup:

Q: The Detective told you that he would speak a word for you?

A: Yeah.

Q: That was Detective Dorsey?

A: Yeah.

State Habeas Transcript at 122.

The district court granted habeas relief to McCleskey under *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763, L.Ed.2d 104 (1972). At the threshold the district court pointed out that *Giglio* applies not only to "traditional deals" made by the prosecutor in exchange for testimony but also to "any promises or understandings made by any member of the prosecutorial team, which includes police investigators." 580 F.Supp. at 380. The court then made these subsidiary findings: (1) that Evans's testimony was highly damaging; (2) that "the jury was clearly left with the impression that Evans was unconcerned about any charges which were pending against him and that no promises had been made which would affect his credibility," *id.* at 381; (3) that at petitioner's state habeas hearings Evans testified "that one of the detectives investigating the case had promised to speak to federal authorities on his behalf," *id.*; (4) that the escape charges pending against Evans were dropped subsequent to McCleskey's trial.

The en banc court seems to me to err on several grounds. It blurs the proper application of *Giglio* by focusing sharply on the word "promise." The proper inquiry is not limited to formal contracts, unilateral or bilateral, or words of contract law, but "to ensure that the jury knew the facts that might motivate a witness in giving testimony." *Smith v. Kemp*, 715 F.2d 1459, 1467 (11th Cir.1983). *Giglio* reaches the informal understanding as well as the formal. The point is, even if the deal-



ings are informal, can the witness reasonably view the government's undertaking as offering him a benefit and can a juror knowing of it reasonably view it as motivating the witness in giving testimony? The verbal undertaking made in this instance by an investigating state officer, who is a member of the prosecution team, that he will "put in a word for him" on his pending federal charge was an undertaking that a jury was entitled to know about.

Second, the en banc court finds the benefit too marginal. Of course, the possible benefit to a potential witness can be so minimal that a court could find as a matter of law no *Giglio* violation occurred. A trivial offer is not enough. The subject matter of the offer to Evans was substantial, or at least a jury was entitled to consider it so. After McCleskey was tried and convicted, the federal charge was dropped.

Third, the court concludes there was no reasonable likelihood that Evans's testimony affected the judgment of the jury. Co-defendant Wright was the only eyewitness. He was an accomplice, thus his testimony, unless corroborated, was insufficient to establish that McCleskey was the triggerman. The en banc court recognizes this problem but avoids it by holding that Wright's testimony was corroborated by "McCleskey's own confession." This could refer to either of two admissions of guilt by McCleskey. He "confessed" to Wright, but Wright's testimony on this subject could not be used to corroborate Wright's otherwise insufficient accomplice testimony. Testimony of an accomplice cannot be corroborated by the accomplice's own testimony. The other "confession" was made to Evans and testified to by Evans. Thus Evans is not a minor or incidental witness. Evans' testimony, describing what McCleskey "confessed" to him, is the corroboration for the testimony of the only eyewitness, Wright. And that eyewitness gave the only direct evidence that McCleskey killed the officer.

The district court properly granted the writ on *Giglio* grounds. Its judgment should be affirmed.

JOHNSON, Circuit Judge, dissenting in part and concurring in part, with whom HATCHETT and CLARK, Circuit Judges join:

Warren McCleskey has presented convincing evidence to substantiate his claim that Georgia has administered its death penalty in a way that discriminates on the basis of race. The Baldus Study, characterized as "far and away the most complete and thorough analysis of sentencing" ever carried out,<sup>1</sup> demonstrates that in Georgia a person who kills a white victim has a higher risk of receiving the death penalty than a person who kills a black victim. Race alone can explain part of this higher risk. The majority concludes that the evidence "confirms rather than condemns the system" and that it fails to support a constitutional challenge. I disagree. In my opinion, this disturbing evidence can and does support a constitutional claim under the Eighth Amendment. In holding otherwise, the majority commits two critical errors: it requires McCleskey to prove that the State intended to discriminate against him personally and it underestimates what his evidence actually did prove. I will address each of these concerns before commenting briefly on the validity of the Baldus Study and addressing the other issues in this case.

# I. THE EIGHTH AMENDMENT AND RACIAL DISCRIMINATION IN THE ADMINISTRATION OF THE DEATH PENALTY

McCleskey claims that Georgia administers the death penalty in a way that discriminates on the basis of race. The district court opinion treated this argument as one arising under the Fourteenth Amendment<sup>2</sup> and ex-

<sup>1</sup> This was the description given at trial by Dr. Richard Berk, member of a panel of the National Academy of Sciences charged with reviewing all previous research on criminal sentencing issues in order to set standards for the conduct of such research.

<sup>2</sup> The district court felt bound by precedent to analyze the claim under the equal protection clause, but expressed the opinion that it

plicitly rejected the petitioner's claim that he could raise the argument under the Eighth Amendment, as well. The majority reviews each of these possibilities and concludes that there is little difference in the proof necessary to prevail under any of the theories: whatever the constitutional source of the challenge, a petitioner must show a disparate impact great enough to compel the conclusion that purposeful discrimination permeates the system. These positions reflect a misunderstanding of the nature of an Eighth Amendment claim in the death penalty context: the Eighth Amendment prohibits the racially discriminatory application of the death penalty and *McCleskey* does not have to prove intent to discriminate in order to show that the death penalty is being applied arbitrarily and capriciously.

#### A. The Viability of an Eighth Amendment Challenge

As the majority recognizes, the fact that a death penalty statute is facially valid does not foreclose an Eighth Amendment challenge based on the systemwide application of that statute. The district court most certainly erred on this issue. Applying the death penalty in a racially discriminatory manner violates the Eighth Amendment. Several members of the majority in *Furman v. Georgia*, 408 U.S. 238, 245-57, 310, 364-65, 92 S.Ct. 2726, 2729-36, 2796, 2790-91, 33 L.Ed.2d 346 (1972) (concurring opinions of Douglas, Stewart, Marshall, JJ.), relied in part on the disproportionate impact of the death penalty on racial minorities in concluding that the death penalty as then administered constituted arbitrary and capricious punishment.

When decisionmakers look to the race of a victim, a factor completely unrelated to the proper concerns of the

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might best be understood as a due process claim. It does not appear that a different constitutional basis for the claim would have affected the district court's conclusions.

sentencing process enters into determining the sentence. Reliance on the race of the victim means that the sentence is founded in part on a morally and constitutionally repugnant judgment regarding the relative low value of the lives of black victims. *Cf. Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (listing race of defendant as a factor "constitutionally impermissible or totally irrelevant to the sentencing process"). There is no legitimate basis in reason for relying on race in the sentencing process. Because the use of race is both irrelevant to sentencing and impermissible, sentencing determined in part by race is arbitrary and capricious and therefore a violation of the Eighth Amendment. *See Furman v. Georgia*, 408 U.S. 238, 256, 92 S.Ct. 2726, 2735, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring) ("the high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups").

#### B. The Eighth Amendment and Proof of Discriminatory Intent

The central concerns of the Eighth Amendment deal more with decisionmaking processes and groups of cases than with individual decisions or cases. In a phrase repeated throughout its later cases, the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 195 n.46, 96 S.Ct. 2909, 2935 n.46, 49 L.Ed.2d 859 (1976) (plurality opinion), stated that a "pattern of arbitrary and capricious sentencing" would violate the Eighth Amendment. In fact, the Court has consistently adopted a systematic perspective on the death penalty, looking to the operation of a state's entire sentencing structure in determining whether it inflicted sentences in violation of the Eighth Amendment. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982) (capital punishment must be imposed "fairly, and with reasonable con-

sistency, or not at all"); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.").

Without this systemic perspective, review of sentencing would be extremely limited, for the very idea of arbitrary and capricious sentencing takes on its fullest meaning in a comparative context. A non-arbitrary sentencing structure must provide some meaningful way of distinguishing between those who receive the death sentence and those who do not. *Godfrey v. Georgia*, 446 U.S. 420, 433, 100 S.Ct. 1759, 1767, 64 L.Ed.2d 398 (1980); *Furman v. Georgia*, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (1972) (White J., concurring). Appellate proportionality review is not needed in every case but consistency is still indispensable to a constitutional sentencing system.<sup>3</sup> The import of any single sentencing decision depends less on the intent of the decisionmaker than on the outcome in comparable cases. Effects evidence is well suited to this type of review.

This emphasis on the outcomes produced by the entire system springs from the State's special duty to insure fairness with regard to something as serious as a death sentence. See *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983); *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305,

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<sup>3</sup> The Supreme Court in *Pulley v. Harris*, — U.S. —, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), emphasized the importance of factors other than appellate proportionality review that would control jury discretion and assure that sentences would not fall into an arbitrary pattern. The decision in *Pulley* deemphasizes the importance of evidence of arbitrariness in individual cases and looks exclusively to "systemic" arbitrariness. The case further underscores this court's responsibility to be alert to claims, such as the one McCleskey makes, that allege more than disproportionality in a single sentence.



96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion). Monitoring patterns of sentences offers an especially effective way to detect breaches of that duty. Indeed, because the death penalty retains the need for discretion to make individualized judgments while at the same time heightening the need for fairness and consistency, *Eddings v. Oklahoma*, *supra*, 455 U.S. at 110-12, 102 S.Ct. at 874-75, patterns of decisions may often be the only acceptable basis of review. Discretion hinders inquiry into intent: if unfairness and inconsistency are to be detected even when they are not overwhelming or obvious, effects evidence must be relied upon.

Insistence on systemwide objective standards to guide sentencing reliably prevents aberrant decisions without having to probe the intentions of juries or other decision-makers. *Gregg v. Georgia*, *supra*, 428 U.S. at 198, 96 S.Ct. at 2936; *Woodson v. North Carolina*, *supra*, 428 U.S. at 303, 96 S.Ct. at 2990 (objective standards necessary to "make rationally reviewable the process for imposing the death penalty"). The need for the State to constrain the discretion of juries in the death penalty area is unusual by comparison to other areas of the law. It demonstrates the need to rely on systemic controls as a way to reconcile discretion and consistency; the same combined objectives argue for the use of effects evidence rather than waiting for evidence of improper motives in specific cases.

Objective control and review of sentencing structures is carried so far that a jury or other decisionmaker may be presumed to have intended a non-arbitrary result when the outcome is non-arbitrary by an objective standard; the law, in short, looks to the result rather than the actual motives.<sup>4</sup> In *Westbrook v. Zant*, 704 F.2d 1487,

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<sup>4</sup> *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and other cases demonstrate that the actual deliberations of the sentencer are relevant under the Eighth Amendment, for mitigating factors must have their proper place in all deliberations. But the sufficiency of intent in proving an Eighth Amendment violation does not imply the necessity of intent for all such claims.

1504 (11th Cir.1983), this Court held that, even though a judge might not properly instruct a sentencing jury regarding the proper definition of aggravating circumstances, the "uncontrolled discretion of an uninstructed jury" can be cured by review in the Georgia Supreme Court. The state court must find that the record shows the presence of statutory aggravating factors that a jury could have relied upon. If the factors are present in the record it does not matter that the jury may have misunderstood the role of aggravating circumstances. If the State can unintentionally succeed in preventing arbitrary and capricious sentencing, it would seem that the State can also fail in its duty even though none of the relevant decisionmakers intend such a failure.<sup>5</sup>

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<sup>5</sup> The only Fifth or Eleventh Circuit cases touching on the issue of discriminatory intent under the Eighth Amendment appear to be inconsistent with the Supreme Court's approach and therefore wrongly decided. The court in *Smith v. Balkcom*, 660 F.2d 573, 584 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. 1982), stated that Eighth Amendment challenges based on race require a showing of intent, but the court reached this conclusion because it wrongly believed that *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), compelled such a result. The *Spinkellink* court never reached the question of intent, holding that Supreme Court precedent foreclosed all Eighth Amendment challenges except for extreme cases where the sentence is shockingly disproportionate to the crime. 578 F.2d at 606 & n. 28. See *supra* note 3. The *Smith* court cites to a portion of the *Spinkellink* opinion dealing with equal protection arguments. 578 F.2d at 614 n. 40. Neither of the cases took note of the most pertinent Eighth Amendment precedents decided by the Supreme Court.

Other Eleventh Circuit cases mention that habeas corpus petitioners must prove intent to discriminate racially against them personally in the application of the death sentence. But these cases all either treat the claim as though it arose under the Fourteenth Amendment alone or rely on *Smith* or one of its successors. See *Sullivan v. Wainwright*, 721 F.2d 316 (11th Cir. 1983); *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir. 1983). Of course, to the extent these cases attempt to foreclose Eighth Amendment challenges of this sort or require proof of particularized intent to discriminate, they are inconsistent with the Supreme Court's inter-

In sum, the Supreme Court's systemic and objective perspective in the review and control of death sentencing indicates that a pattern of death sentences skewed by race alone will support a claim of arbitrary and capricious sentencing in violation of the Eighth Amendment. See *Furman v. Georgia*, 408 U.S. 238, 253, 92 S.Ct. 2726, 2733, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring) ("We cannot say that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties."). The majority's holding on this issue conflicts with every other constitutional limit on the death penalty. After today, in this Circuit arbitrariness based on race will be more difficult to eradicate than any other sort of arbitrariness in the sentencing system.

## II. PROVING DISCRIMINATORY EFFECT AND INTENT WITH THE BALDUS STUDY

The statistical study conducted by Dr. Baldus provides the best possible evidence of racially disparate impact. It began with a single unexplained fact: killers of white victims in Georgia over the last decade have received the death penalty eleven times more often than killers of black victims.<sup>6</sup> It then employed several statistical techniques, including regression analysis, to isolate the amount of that disparity attributable to both racial and non-racial factors. Each of the techniques yielded a statistically significant racial influence of at least six percent; in other words, they all showed that the pattern of sentencing could only be explained by assuming that the

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pretation of the Eighth Amendment. Cf. *Gates v. Collier*, 501 F.2d 1291, 1300-01 (5th Cir. 1974) (prohibition against cruel and unusual punishment "is not limited to specific acts directed at selected individuals").

<sup>6</sup> Among those who were eligible for the death penalty, eleven percent of the killers of white victims received the death penalty, while one percent of the killers of black victims received it.

race of the victim made all defendants convicted of killing white victims at least six percent more likely to receive the death penalty. Other factors<sup>7</sup> such as the number of aggravating circumstances or the occupation of the victim could account for some of the eleven-to-one differential, but the race of the victim remained one of the strongest influences.

Assuming that the study actually proves what it claims to prove, an assumption the majority claims to make, the evidence undoubtedly shows a disparate impact. Regression analysis has the great advantage of showing that a perceived racial effect is an actual racial effect because it controls for the influence of non-racial factors. By screening out non-racial explanations for certain outcomes, regression analysis offers a type of effects evidence that approaches evidence of intent, no matter what level of disparity is shown. For example, the statistics in this case show that a certain number of death penalties were probably imposed *because* of race, without ever inquiring directly into the motives of jurors or prosecutors.

Regression analysis is becoming a common method of proving discriminatory effect in employment discrimination suits. In fact, the Baldus Study shows effects at least as dramatic and convincing as those in statistical studies offered in the past. *Cf. Segar v. Smith*, 738 F.2d 1249 (D.C.Cir.1984); *Wade v. Mississippi Cooperative Extension Service*, 528 F.2d 508 (5th Cir.1976). Nothing more should be necessary to prove that Georgia is applying its death penalty statute in a way that arbitrarily and capriciously relies on an illegitimate factor—race.<sup>8</sup>

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<sup>7</sup> In one of the largest of these models, the one focused on by the district court and the majority, the statisticians used 230 different independent variables (possible influences on the pattern of sentencing), including several different aggravating and many possible mitigating factors.

<sup>8</sup> See part I, *supra*. Of course, proof of any significant racial effects is enough under the Eighth Amendment, for a requirement of proving large or pervasive effects is tantamount to proof of intent.



Even if proof of discriminatory intent were necessary to make out a constitutional challenge, under any reasonable definition of intent the Baldus Study provides sufficient proof. The majority ignores the fact that McCleskey has shown discriminatory intent at work in the sentencing system even though he has not pointed to any specific act or actor responsible for discriminating against him in particular.<sup>9</sup>

The law recognizes that even though intentional discrimination will be difficult to detect in some situations, its workings are still pernicious and real. *Rose v. Mitchell*, 443 U.S. 545, 559, 99 S.Ct. 2993, 3001, 61 L.Ed.2d 739 (1979). Under some circumstances, therefore, proof of discriminatory effect will be an important first step in proving intent, *Crawford v. Board of Education*, 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982), and may be the best available proof of intent. *Washington v. Davis*, 426 U.S. 229, 241-42, 96 S.Ct. 2040, 2048-49, 48 L.Ed.2d 597 (1976); *United States v. Texas Educational Agency*, 579 F.2d 910, 913-14 & nn.5-7 (5th Cir.1978), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979).

For instance, proof of intentional discrimination in the selection of jurors has traditionally depended on showing racial effects. *See Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 532 (1970); *Gibson v. Zant*, 705 F.2d 1543 (11th Cir.1983). This is because the discretion allowed to jury commissioners, although legitimate, could easily be used to mask conscious or unconscious racial discrimination. The Supreme Court has recognized that the presence of this sort of discretion calls for indirect methods of proof. *Washington v. Davis*, 426 U.S. 229, 241-42, 96 S.Ct. 2040, 2048-

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<sup>9</sup> The same factors leading to the conclusion that an Eighth Amendment claim does not require proof of intent militate even more strongly against using too restrictive an understanding of intent.



49, 48 L.Ed.2d 597 (1976); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266 n.13, 97 S.Ct. 555, 564 n.13, 50 L.Ed.2d 450 (1977).

This Court has confronted the same problem in an analogous setting. In *Searcy v. Williams*, 656 F.2d 1003, 1008-09 (5th Cir.1981), *aff'd sub nom. Hightower v. Searcy*, 455 U.S. 984, 102 S.Ct. 1605, 71 L.Ed.2d 844 (1982), the court overturned a facially valid procedure for selecting school board members because the selections fell into an overwhelming pattern of racial imbalance. The decision rested in part on the discretion inherent in the selection process: "The challenged application of the statute often involves discretion or subjective criteria utilized at a crucial point in the decision-making process."

The same concerns at work in the jury discrimination context operate with equal force in the death penalty context. The prosecutor has considerable discretion and the jury has bounded but irreducible discretion. Defendants cannot realistically hope to find direct evidence of discriminatory intent. This is precisely the situation envisioned in *Arlington Heights*, where the Court pointed out that "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . The evidentiary inquiry is then relatively easy." 429 U.S. at 266, 97 S.Ct. at 564.

As a result, evidence of discriminatory effects presented in the Baldus Study, like evidence of racial disparities in the composition of jury pools<sup>10</sup> and in other

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<sup>10</sup> The majority distinguishes the jury discrimination cases on tenuous grounds, stating that the disparity between the number of minority persons on the jury venire and the number of such persons in the population is an "actual disparity," while the racial influence in this case is not. If actual disparities are to be considered, then the court should employ the actual (and overwhelming) eleven-to-one differential between white victim cases and black victim cases. The percentage figures presented by the Baldus Study are really more reliable than "actual" disparities because they control for possible non-racial factors.

contexts,<sup>11</sup> excludes every reasonable inference other than discriminatory intent at work in the system. This Circuit has acknowledged on several occasions that evidence of this sort could support a constitutional challenge. *Adams v. Wainwright*, 709 F.2d 1443, 1449 (11th Cir.1983); *Smith v. Balkcom*, 660 F.2d 573 (5th Cir. Unit B 1981), *modified in part*, 671 F.2d 858, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); *Spinkellink, supra*, at 614.

A petitioner need not exclude all inferences other than discriminatory intent in his or her particular case.<sup>12</sup> Yet the majority improperly stresses this particularity requirement and interprets it so as to close a door left open by the Supreme Court.<sup>13</sup> It would be nearly impossible to prove through evidence of a system's usual effects that intent must have been a factor in any one case; effects evidence, in this context, necessarily deals with many cases at once. Every jury discrimination charge would be stillborn if the defendant had to prove by direct evidence that the jury commissioners intended to deprive him or her of the right to a jury composed of a fair cross-section of the community. Requiring proof of discrimina-

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<sup>11</sup> *United States v. Texas Educational Agency*, 579 F.2d 910 (5th Cir. 1978), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979), involving a segregated school system, provides another example of effects evidence as applied to an entire decisionmaking system.

<sup>12</sup> The particularity requirement has appeared sporadically in this Court's decisions prior to this time, although it was not a part of the original observation about this sort of statistical evidence in *Smith v. Balkcom, supra*.

<sup>13</sup> The dissenting opinion of Justice Powell in *Stephens v. Kemp*, — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370, 372 (1984), does not undermine the clear import of cases such as the jury discrimination cases. For one thing, a dissent from a summary order does not have the precedential weight of a fully considered opinion of the Court. For another, the *Stephens* dissent considered the Baldus Study as an equal protection argument only and did not address what might be necessary to prove an Eighth Amendment violation.

tion in a particular case is especially inappropriate with regard to an Eighth Amendment claim, for even under the majority's description of the proof necessary to sustain an Eighth Amendment challenge, race operating in a pervasive manner "in the system" will suffice.

The majority, after sowing doubts of this sort, nevertheless concedes that despite the particularity requirement, evidence of the system's effects could be strong enough to demonstrate intent and purpose.<sup>14</sup> Its subsequent efforts to weaken the implications to be drawn from the Baldus Study are uniformly unsuccessful.

For example, the majority takes comfort in the fact that the level of aggravation powerfully influences the sentencing decision in Georgia. Yet this fact alone does not reveal a "rational" system at work. The statistics not only show that the number of aggravating factors is a significant influence; they also point to the race of the victim as a factor of considerable influence. Where racial discrimination contributes to an official decision, the decision is unconstitutional even though discrimination was not the primary motive. *Personnel Administrator v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979).

Neither can the racial impact be explained away by the need for discretion in the administration of the death penalty or by any "presumption that the statute is operating in a constitutional manner." The discretion necessary to the administration of the death penalty does not

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<sup>14</sup> While I agree with Judge Anderson's observation that "the proof of racial motivation required in a death case . . . would be less strict than that required in civil cases or in the criminal justice system generally," I find it inconsistent with his acceptance of the majority outcome. The "exacting" constitutional supervision over the death penalty established by the Supreme Court compels the conclusion that discriminatory effects can support an Eighth Amendment challenge. Furthermore, the majority's evaluation of the evidence in this case is, if anything, *more* strict than in other contexts. See note 10, *supra*.

include the discretion to consider race: the jury may consider any proper aggravating factors, but it may not consider the race of the victim as an aggravating factor. *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983). And a statute deserves a presumption of constitutionality only where there is real uncertainty as to whether race influences its application. Evidence such as the Baldus Study, showing that the pattern of sentences can only be explained by assuming a significant racial influence,<sup>15</sup> overcomes whatever presumption exists.

The majority's effort to discount the importance of the "liberation hypothesis" also fails. In support of his contention that juries were more inclined to rely on race when other factors did not militate toward one outcome or another, Dr. Baldus noted that a more pronounced racial influence appeared in cases of medium aggravation (20 percent) than in all cases combined (6 percent). The majority states that racial impact in a subset of cases cannot provide the basis for a systemwide challenge. However, there is absolutely no justification for such a claim. The fact that a system mishandles a sizeable subset of cases is persuasive evidence that the entire system operates improperly. *Cf. Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1984) (written test discriminates against some employees); *Lewis v. City of New Orleans*, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974) (statute infringing on First Amendment interests in some cases). A system can be applied arbitrarily and capriciously even if it resolves the obvious cases in a rational manner. Admittedly, the lack of a precise definition of medium aggravation cases could lead to either an

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<sup>15</sup> The racial influence operates in the average case and is therefore probably at work in any single case. The majority misconstrues the nature of regression analysis when it says that the coefficient of the race-of-the-victim factor represents the percentage of cases in which race could have been a factor. That coefficient represents the influence of race across all the cases.

overstatement or understatement of the racial influence. Accepting, however, that the racial factor is accentuated to some degree in the middle range of cases,<sup>16</sup> the evidence of racial impact must be taken all the more seriously.

Finally, the majority places undue reliance on several recent Supreme Court cases. It argues that *Ford v. Strickland*, — U.S. —, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984), *Adams v. Wainwright*, — U.S. —, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984), and *Sullivan v. Wainwright*, — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983), support its conclusion that the Baldus Study does not make a strong enough showing of effects to justify an inference of intent. But to the extent that these cases offer any guidance at all regarding the legal standards applicable to these studies,<sup>17</sup> it is clear that the Court considered the validity of the studies rather than their sufficiency. In *Sullivan*, the Supreme Court refused to stay the execution simply because it agreed with the decision of this Court, a decision based on the validity of the study alone.<sup>18</sup> *Sullivan v. Wainwright*, 721 F.2d 316 (11th Cir. 1983) (citing prior cases rejecting statistical evidence because it did not account for non-racial explanations of the effects). As the majority mentions, the methodology of the Baldus Study easily surpasses that of the earlier studies involved in those cases.

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<sup>16</sup> The majority apparently ignores its commitment to accept the validity of the Baldus Study when it questions the definition of "medium aggravation cases" used by Dr. Baldus.

<sup>17</sup> The opinion in *Ford* mentioned this issue in a single sentence; the order in *Adams* was not accompanied by any written opinion at all. None of the three treated this argument as a possible Eighth Amendment claim. Finally, the "death odds multiplier" is not the most pronounced statistic in the Baldus Study: a ruling of insufficiency based on that one indicator would not be controlling here.

<sup>18</sup> Indeed, the Court indicated that it would have reached a different conclusion if the district court and this court had not been given the opportunity to analyze the statistics adequately. — U.S. —, 104 S.Ct. at 451, n. 3, 78 L.Ed.2d at 213, n. 3.



Thus, the Baldus Study offers a convincing explanation of the disproportionate effects of Georgia's death penalty system. It shows a clear pattern of sentencing that can only be explained in terms of race, and it does so in a context where direct evidence of intent is practically impossible to obtain. It strains the imagination to believe that the significant influence on sentencing left unexplained by 230 alternative factors is random rather than racial, especially in a state with an established history of racial discrimination. *Turner v. Fouche, supra*; *Chapman v. King*, 154 F.2d 460 (5th Cir.), *cert. denied*, 327 U.S. 800, 66 S.Ct. 905, 90 L.Ed. 1025 (1946). The petitioner has certainly presented evidence of intentional racial discrimination at work in the Georgia system. Georgia has within the meaning of the Eighth Amendment applied its statute arbitrarily and capriciously.

### III. THE VALIDITY OF THE BALDUS STUDY

The majority does not purport to reach the issue of whether the Baldus Study reliably proves what it claims to prove. However, the majority does state that the district court's findings regarding the validity of the study might foreclose habeas relief on this issue. Moreover, the majority opinion in several instances questions the validity of the study while claiming to be interested in its sufficiency alone. I therefore will summarize some of the reasons that the district court was clearly erroneous in finding the Baldus Study invalid.

The district court fell victim to a misconception that distorted its factual findings. The Court pointed out a goodly number of imperfections in the study but rarely went ahead to determine the significance of those imperfections. A court may not simply point to flaws in a statistical analysis and conclude that is completely unreliable or fails to prove what it was intended to prove. Rather, the Court must explain why the imperfection makes the study less capable of proving the proposition

that it was meant to support. *Eastland v. Tennessee Valley Authority*, 704 F.2d 613 (11th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1415, 79 L.Ed.2d 741 (1984).

Several of the imperfections noted by the district court were not legally significant because of their minimal effect. Many of the errors in the data base match this description. For instance, the "mismatches" in data entered once for cases in the Procedural Reform Study and again for the same cases in the Charging and Sentencing Study were scientifically negligible. The district court relied on the data that changed from one study to the next in concluding that the coders were allowed too much discretion. But most of the alleged "mismatches" resulted from intentional improvements in the coding techniques and the remaining errors<sup>19</sup> were not large enough to affect the results.

The data missing in some cases was also a matter of concern for the district court. The small effects of the missing data leave much of that concern unfounded. The race of the victim was uncertain in 6% of the cases at most<sup>20</sup>; penalty trial information was unavailable in the same percentage of cases.<sup>21</sup> The relatively small amount of missing data, combined with the large number of variables used in several of the models, should have led the

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<sup>19</sup> The remaining errors affected little more than one percent of the data in any of the models. Data errors of less than 10 or 12% generally do not threaten the validity of a model.

<sup>20</sup> Dr. Baldus used an "imputation method," whereby the rate of the victim was assumed to be the same as the race of the defendant. Given the predominance of murders where the victim and defendant were of the same race, this method was a reasonable way of estimating the number of victims of each race. It further reduced the significance of this missing data.

<sup>21</sup> The district court, in assessing the weight to be accorded this omission, assumed that Dr. Baldus was completely unsuccessful in predicting how many of the cases led to penalty trials. Since the prediction was based on discernible trends in the rest of the cases, the district court was clearly erroneous to give no weight to the prediction.

court to rely on the study. Statistical analyses have never been held to a standard of perfection or near perfection in order for courts to treat them as competent evidence. *Trout v. Lehman*, 702 F.2d 1094, 1101-02 (D.C. Cir. 1983). Minor problems are inevitable in a study of this scope and complexity: the stringent standards used by the district court would spell the loss of most statistical evidence.

Other imperfections in the study were not significant because there was no reason to believe that the problem would work systematically to expand the size of the race-of-the-victim factor rather than to contract it or leave it unchanged. The multicollinearity problem is a problem of notable proportions that nonetheless did not increase the size of the race-of-the-victim factor.<sup>22</sup> Ideally the independent variables in a regression analysis should not be related to one another. If one independent variable merely serves as a proxy for another, the model suffers from "multicollinearity." That condition could either

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<sup>22</sup> The treatment of the coding conventions provides another example. The district court criticized Dr. Baldus for treating "U" codes (indicating uncertainty as to whether a factor was present in a case) as being beyond the knowledge of the jury and prosecutor ("absent") rather than assuming that the decisionmakers knew about the factor ("present"). Baldus contended that, if the extensive records available on each case did not disclose the presence of a factor, chances were good that the decisionmakers did not know of its presence, either. Dr. Berk testified that the National Academy of Sciences had considered this same issue and had recommended the course taken by Dr. Baldus. Dr. Katz, the expert witness for the state, suggested removing the cases with the U codes from the study altogether. The district court's suggestion, then, that the U codes be treated as present, appears to be groundless and clearly erroneous.

Baldus later demonstrated that the U codes did not affect the race-of-the-victim factor by recoding all the items coded with a U and treating them as present. Each of the tests showed no significant reduction in the racial variable. The district court rejected this demonstration because it was not carried out using the largest available model.

reduce the statistical significance of the variables or distort their relationships to one another. Of course, to the extent that multicollinearity reduces statistical significance it suggests that the racial influence would be even more certain if the multicollinearity had not artificially depressed the variable's statistical significance. As for the distortions in the relationships between the variables, experts for the petitioner explained that multicollinearity tends to dampen the racial effect rather than enhance it.<sup>23</sup>

The district court did not fail in every instance to analyze the significance of the problems. Yet when it did reach this issue, the court at times appeared to misunderstand the nature of this study or of regression analysis generally. In several related criticisms, it found that any of the models accounting for less than 230 independent variables were completely worthless (580 F.Supp. at 361), that the most complete models were unable to capture every nuance of every case (580 F.Supp. at 356, 371), and that the models were not sufficiently predictive to be relied upon in light of their low  $R^2$  value (580 F.Supp. at 361).<sup>24</sup> The majority implicitly questions the validity of the Baldus Study on several occasions when it adopts the first two of these criticisms.<sup>25</sup> A proper under-

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<sup>23</sup> The district court rejected this expert testimony, not because of any rebuttal testimony, but because it allegedly conflicted with the petitioner's other theory that multicollinearity affects statistical significance. 580 F.Supp. at 364. The two theories are not inconsistent, for neither Dr. Baldus nor Dr. Woodworth denied that multicollinearity might have multiple effects. The two theories each analyze one possible effect. Therefore, the district court rejected this testimony on improper grounds.

<sup>24</sup> The  $R^2$  measurement represents the influence of random factors unique to each case that could not be captured by addition of another independent variable. As  $R^2$  approaches a value of 1.0, one can be more sure that the independent variables already identified are accurate and that no significant influences are masquerading as random influences.

<sup>25</sup> See, e.g., pp. 896, 899.

standing of statistical methods shows, however, that these are not serious shortcomings in the Baldus Study.

The district court mistrusted smaller models because it placed too much weight on one of the several complementary goals of statistical analysis. Dr. Baldus testified that in his opinion the 39-variable model was the best among the many models he produced. The district court assumed somewhat mechanistically that the more independent variables encompassed by a model, the better able it was to estimate the proper influence of non-racial factors. But in statistical models, bigger is not always better. After a certain point, additional independent variables become correlated with variables already being considered and distort or suppress their influence. The most accurate models strike an appropriate balance between the risk of omitting a significant factor and the risk of multicollinearity. Hence, the district court erred in rejecting all but the largest models.

The other two criticisms mentioned earlier spring from a single source—the misinterpretation of the  $R^2$  measurement.<sup>26</sup> The failure of the models to capture every nuance of every case was an inevitable but harmless failure. Regression analysis accounts for this limitation with an  $R^2$  measurement. As a result, it does not matter that a study fails to consider every nuance of every case because random factors (factors that influence the outcome in a sporadic and unsystematic way) do not impugn the reliability of the systemwide factors already identified, including race of the victim. Failure to consider extra factors becomes a problem only where they operate throughout the system, that is, where  $R^2$  is inappropriately low.

The district court did find that the  $R^2$  of the 230-variable study, which was nearly .48, was too low.<sup>27</sup> But an

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<sup>26</sup> See footnote 24.

<sup>27</sup> It based that finding on the fact that a model with an  $R^2$  less than .5 “does not predict the outcome in half of the cases.” This is an inaccurate statement, for an  $R^2$  actually represents the per-



$R^2$  of that size is not inappropriately low in every context.<sup>28</sup> The  $R^2$  measures random factors unique to each case: in areas where such factors are especially likely to occur, one would expect a low  $R^2$ . As the experts, the district court and the majority have pointed out, no two death penalty cases can be said to be exactly alike, and it is especially unlikely for a statistical study to capture every influence on a sentence. In light of the random factors at work in the death penalty context, the district court erred in finding the  $R^2$  of all the Baldus Study models too low.<sup>29</sup>

Errors of this sort appear elsewhere in the district court opinion and leave me with the definite and firm conviction that the basis for the district court's ruling on the invalidity of the study was clearly erroneous. *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). This statistical analysis, while imperfect, is sufficiently complete and reliable to serve as competent evidence to guide the court. Accordingly, I would reverse the judgment of the district court with regard to the validity of the Baldus Study. I would also reverse that court's determination that an Eighth Amend-

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centage of the original 11-to-1 differential explained by all the independent variables combined. A model with an  $R^2$  of less than .5 would not necessarily fail to predict the outcome in half the cases because the model improves upon pure chance as a way of correctly predicting an outcome. For dichotomous outcomes (i.e. the death penalty is imposed or it is not), random predictions could succeed half the time.

<sup>28</sup> *Wilkins v. University of Houston*, 654 F.2d 388, 405 (5th Cir. 1981), is not to the contrary. That court stated only that it could not know whether an  $R^2$  of .52 or .53 percent would be inappropriately low in that context since the parties had not made any argument on the issue.

<sup>29</sup> Furthermore, an expert for the petitioner offered the unchallenged opinion that the  $R^2$  measurements in studies of dichotomous outcomes are understated by as much as 50%, placing the  $R^2$  values of the Baldus Study models somewhere between .7 and .9.

ment claim is not available to the petitioner. He is entitled to relief on this claim.

#### IV. OTHER ISSUES

I concur in the opinion of the court with regard to the death-oriented jury claim and in the result reached by the court on the ineffective assistant of counsel claim. I must dissent, however, on the two remaining issues in the case. I disagree with the holding on the *Giglio* issue, on the basis of the findings and conclusions of the district court and the dissenting opinion of Chief Judge Godbold. As for the *Sandstrom* claim, I would hold that the instruction was erroneous and that the error was not harmless.

It is by no means certain that an error of this sort can be harmless. See *Connecticut v. Johnson*, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983). Even if an error could be harmless, the fact that McCleskey relied on an alibi defense does not mean that intent was "not at issue" in the case. Any element of a crime can be at issue whether or not the defendant presents evidence that disputes the prosecution's case on that point. The jury could find that the prosecution had failed to dispel all reasonable doubts with regard to intent even though the defendant did not specifically make such an argument. Intent is at issue wherever there is evidence to support a reasonable doubt in the mind of a reasonable juror as to the existence of criminal intent. See *Lamb v. Jernigan*, 683 F.2d 1332, 1342-43 (11th Cir.1982) ("no reasonable juror could have determined . . . that appellant acted out of provocation or self-defense," therefore error was harmless).

The majority states that the raising of an alibi defense does not automatically render a *Sandstrom* violation harmless. It concludes, however, that the raising of a non-participation defense coupled with "overwhelming evidence of an intentional killing" will lead to a finding of harmless error. The majority's position is indistinguishable from a finding of harmless error based solely

on overwhelming evidence.<sup>30</sup> Since a defendant normally may not relieve the jury of its responsibility to make factual findings regarding every element of an offense, the only way for intent to be "not at issue" in a murder trial is if the evidence presented by either side provides no possible issue of fact with regard to intent. Thus, McCleskey's chosen defense in this case should not obscure the sole basis for the disagreement between the majority and myself: the reasonable inferences that could be drawn from the circumstances of the killing. I cannot agree with the majority that no juror, based on any reasonable interpretation of the facts, could have had a reasonable doubt regarding intent.

Several factors in this case bear on the issue of intent. The shooting did not occur at point-blank range. Furthermore, the officer was moving at the time of the shooting. On the basis of these facts and other circumstances of the shooting, a juror could have had a reasonable doubt as to whether the person firing the weapon intended to kill. While the majority dismisses this possibility as "mere speculation," the law requires an appellate court to speculate about what a reasonable juror *could* have concluded. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). Therefore, the judgment of the district court should be reversed on this ground, as well.

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<sup>30</sup> Indeed, the entire harmless error analysis employed by the court may be based on a false dichotomy between "overwhelming evidence" and elements "not at issue." Wherever intent is an element of a crime, it can only be removed as an issue by overwhelming evidence. The observation by the plurality in *Connecticut v. Johnson*, *supra*, that a defendant may in some cases "admit" an issue, should only apply where the evidence allows only one conclusion. To allow an admission to take place in the face of evidence to the contrary improperly infringes on the jury's duty to consider all relevant evidence.

HATCHETT, Circuit Judge, dissenting in part, and concurring in part:<sup>1</sup>

In this case, the Georgia system of imposing the death penalty is shown to be unconstitutional. Although the Georgia death penalty statutory scheme was held constitutional "on its face" in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), application of the scheme produces death sentences explainable only on the basis of the race of the defendant and the race of the victim.

I write to state clearly and simply, without the jargon of the statisticians, the results produced by the application of the Georgia statutory death penalty scheme, as shown by the Baldus Study.

The Baldus Study is valid. The study was designed to answer the questions when, if ever, and how much, if at all, race is a factor in the decision to impose the death penalty in Georgia. The study gives the answers: In Georgia, when the defendant is black and the victim of murder is white, a 6 percent greater chance exists that the defendant will receive the death penalty solely because the victim is white. This 6 percent disparity is present throughout the total range of death-sentenced black defendants in Georgia. While the 6 percent is troublesome, it is the disparity in the mid-range on which I focus. When cases are considered which fall in the mid-range, between less serious and very serious aggravating circumstances, where the victim is white, the black defendant has a 20 percent greater chance of receiving the death penalty because the victim is white, rather than black. This is intolerable; it is in this middle range of cases that the decision on the proper sentence is most dif-

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<sup>1</sup> Although I concur with the majority opinion on the ineffective assistance of counsel and death-oriented jury issues, I write separately to express my thoughts on the Baldus Study.

I also join Chief Judge Godbold's dissent, as to the *Giglio* issue, and Judge Johnson's dissent.

ficult and imposition of the death penalty most questionable.

The disparity shown by the study arises from a variety of statistical analyses made by Dr. Baldus and his colleagues. First, Baldus tried to determine the effect of race of the victim in 594 cases (PRS study) comprising all persons convicted of murder during a particular period. To obtain better results, consistent with techniques approved by the National Academy of Sciences, Baldus identified 2,500 cases in which persons were indicted for murder during a particular period and studied closely 1,066 of those cases. He identified 500 factors, bits of information, about the defendants, the crime, and other circumstances surrounding each case which he thought had some impact on a death sentence determination. Additionally, he focused on 230 of these factors which he thought most reflected the relevant considerations in a death penalty decision. Through this 230-factor model, the study proved that black defendants indicted and convicted for murder of a white victim begin the penalty stage of trial with a significantly greater probability of receiving the death penalty, solely because the victim is white.

Baldus also observed thirty-nine factors, including information on aggravating circumstances, which match the circumstances in this case. This focused study of the aggravating circumstances in the mid-range of severity indicated that "white victim crimes were shown to be 20 percent more likely to result in a death penalty sentence than equally aggravated black victim crimes." Majority at 896.

We must not lose sight of the fact that the 39-factor model considers information relevant to the impact of the decisions being made by law enforcement officers, prosecutors, judges, and juries in the decision to impose the death penalty. The majority suggests that if such a disparity resulted from an identifiable actor or agency in the prosecution and sentencing process, the present 20 percent



racial disparity could be great enough to declare the Georgia system unconstitutional under the eighth amendment. Because this disparity is not considered great enough to satisfy the majority, or because no identification of an actor or agency can be made with precision, the majority holds that the statutory scheme is approved by the Constitution. Identified or unidentified, the result of the unconstitutional ingredient of race, at a significant level in the system, is the same on the black defendant. The inability to identify the actor or agency has little to do with the constitutionality of the system.

The 20 percent greater chance in the mid-range cases (because the defendant is black and the victim is white), produces a disparity that is too high. The study demonstrates that the 20 percent disparity, in the real world, means that one-third of the black defendants (with white victims) in the mid-range cases will be affected by the race factor in receiving the death penalty. Race should not be allowed to take a significant role in the decision to impose the death penalty.

The Supreme Court has reminded us on more than one occasion that "if a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 (1980). A statute that intentionally or unintentionally allows for such racial effects is unconstitutional under the eighth amendment. Because the majority holds otherwise, I dissent.<sup>2</sup>

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<sup>2</sup> Nothing in the majority opinion regarding the validity, impact, or constitutional significance of studies on discrimination in application of the Florida death penalty scheme should be construed to imply that the United States Supreme Court has squarely passed on the Florida studies. Neither the Supreme Court nor the Eleventh Circuit has passed on the Florida studies, on a fully developed record (as in this case), under fourteenth and eighth amendment challenges.

CLARK, Circuit Judge, dissenting in part and concurring in part \* :

We are challenged to determine how much racial discrimination, if any, is tolerable in the imposition of the death penalty. Although I also join in Judge Johnson's dissent, this dissent is directed to the majority's erroneous conclusion that the evidence in this case does not establish a *prima facie* Fourteenth Amendment violation.

### *The Study*

The Baldus study, which covers the period 1974 to 1979, is a detailed study of over 2,400 homicide cases. From these homicides, 128 persons received the death penalty. Two types of racial disparity are established—one based on the race of the victim and one based on the race of the defendant. If the victim is white, a defendant is more likely to receive the death penalty. If the defendant is black, he is more likely to receive the death penalty. One can only conclude that in the operation of this system the life of a white is dearer, the life of a black cheaper.

Before looking at a few of the figures, a perspective is necessary. Race is a factor in the system only where there is room for discretion, that is, where the decision maker has a viable choice. In the large number of cases, race has no effect. These are cases where the facts are so mitigated the death penalty is not even considered as a possible punishment. At the other end of the spectrum are the tremendously aggravated murder cases where the defendant will very probably receive the death penalty, regardless of his race or the race of the victim. In between is the mid-range of cases where there is an approximately 20% racial disparity.

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\* Although I concur with the majority opinion on the ineffective assistance of counsel and death oriented jury issues, I write separately to express my thoughts on the Baldus Study. I also join Chief Judge Godbold's dissent and Judge Johnson's dissent.

The Baldus study was designed to determine whether like situated cases are treated similarly. As a starting point, an unanalyzed arithmetic comparison of all of the cases reflected the following:

Death Sentencing Rates by Defendant/ Victim Racial Combination <sup>1</sup>			
A Black Defendant/ White Victim	B White Defendant/ White Victim	C Black Defendant/ Black Victim	D White Defendant/ Black Victim
.22 (50/228)	.08 (58/745)	.01 (18/1438)	.03 (2/64)
	.11 (108/973)		.013 (20/1502)

These figures show a gross disparate racial impact—that where the victim was white there were 11% death sentences, compared to only 1.3 percent death sentences when the victim was black. Similarly, only 8% of white defendants received the death penalty when the victim was white. The Supreme Court has found gross disparities to be sufficient proof of discrimination to support a Fourteenth Amendment violation.<sup>2</sup>

The Baldus study undertook to determine if this racial sentencing disparity was caused by considerations of race or because of other factors or both. In order to find out, it was necessary to analyze and compare each of the potential death penalty cases and ascertain what relevant factors were available for consideration by the decision makers.<sup>3</sup> There were many factors such as prior capital record, contemporaneous offense, motive, killing to avoid

<sup>1</sup> DB Exhibit 63.

<sup>2</sup> See discussion below at Page 9.

<sup>3</sup> An individualized method of sentencing makes it possible to differentiate each particular case “in an objective, evenhanded, and substantially rational way from the many Georgia murder cases in which the death penalty may not be imposed.” *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235, 251.

arrest or for hire, as well as race. The study showed that race had as much or more impact than any other single factor. See Exhibits DB 76-78, T-776-87. Stated another way, race influences the verdict just as much as any one of the aggravating circumstances listed in Georgia's death penalty statute.<sup>4</sup> Therefore, in the application of the statute in Georgia, race of the defendant and of the victim, when it is black/white, functions as if it were an aggravating circumstance in a discernible number of cases. See *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983) (race as an aggravating circumstance would be constitutionally impermissible).

Another part of the study compared the disparities in death penalty sentencing according to race of the defendant and race of the victim and reflected the differences in the sentencing depending upon the predicted chance of death, *i.e.*, whether the type of case was or was not one where the death penalty would be given.

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<sup>4</sup> I.C.G.A. § 17-10-30.

Table 43

RACE OF DEFENDANT DISPARITIES IN DEATH SENTENCING RATES CONTROLLING FOR THE PREDICTED  
LIKELIHOOD OF A DEATH SENTENCE AND THE RACE OF THE VICTIM

A	B	C	D	E	F	G	H	I	J
Predicted Chance of a Death Sentence 1 (least) to 8 (highest)	Average Actual Sentencing Rate for the Cases at Each Level	Death Sentencing Rates for White Victim Cases Involving		Arithmetic Difference in Race of the Defendant Rates (Col. C-Col. D)	Ratio of Race of the Defendant Rates (Col. C/Col. D)	Death Sentencing Rates for Black Victim Cases Involving		Arithmetic Difference in Race of the Defendant Rates (Col. C-Col. H)	Ratio of Race of the Defendant Rates (Col. C-Col. H)
		Black Defendants	White Defendants			Black Defendants	White Defendants		
1	.0 (0/33)	.0 (0/9)	.0 (0/5)	.0	—	.0 (0/19)	—	—	.0
2	.0 (0/56)	.0 (0/8)	.0 (0/19)	.0	—	.0 (0/27)	.0 (0/1)	.0	.0
3	.08 (6/77)	.30 (3/10)	.03 (1/39)	.27	10.	.11 (2/18)	.0 (0/9)	.11	.0
4	.07 (4/57)	.23 (3/13)	.04 (1/29)	.19	5.75	.0 (0/15)	—	—	—
5	.27 (15/58)	.35 (9/26)	.20 (4/20)	.15	1.75	.17 (2/12)	—	—	—
6	.18 (11/63)	.38 (3/8)	.16 (5/32)	.22	2.38	.05 (1/20)	.50 (2/4)	-.45	.10
7	.41 (29/70)	.64 (9/14)	.39 (15/39)	.25	1.64	.39 (5/13)	.0 (0/5)	.39	.0
8	.88 (51/58)	.91 (20/22)	.89 (25/28)	.02	1.02	.75 (6/8)	—	—	—





Columns A and B reflect the step progression of least aggravated to most aggravated cases. Table 43, DB, Ex. 91.<sup>5</sup> Columns C and D compare sentencing rates of black defendants to white defendants when the victim is white and reflect that in Steps 1 and 2 no death penalty was given in those 41 cases. In Step 8, 45 death penalties were given in 50 cases, only two blacks and three whites escaping the death penalty—this group obviously representing the most aggravated cases. By comparing Steps 3 through 7, one can see that in each group black defendants received death penalties disproportionately to white defendants by differences of .27, .19, .15, .22, and .25. This indicates that unless the murder is so vile as to almost certainly evoke the death penalty (Step 8), blacks are approximately 20% more likely to get the death penalty.

The right side of the chart reflects how unlikely it is that any defendant, but more particularly white defendants, will receive the death penalty when the victim is black.

### *Statistics as Proof*

The jury selection cases have utilized different methods of statistical analysis in determining whether a disparity is sufficient to establish a *prima facie* case of purposeful discrimination.<sup>6</sup> Early jury selection cases, such as *Swain*

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<sup>5</sup> The eight sub-groups were derived from the group of cases where the death penalty was predictably most likely based upon an analysis of the relevant factors that resulted in the vast majority of defendants receiving the death penalty—116 out of the total 128. This group was then sub-divided into the eight sub-groups in ascending order giving consideration to more serious aggravating factors and larger combinations of them as the steps progress. Tr. pages 877-83.

<sup>6</sup> In *Villafane v. Manson*, 504 F.Supp. 78 (D.Conn. 1980), the court noted that four forms of analysis have been used: (1) the absolute difference test used in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); (2) the ratio approach; (3) a test that moves away from the examination of percentages and

*v. Alabama*, used very simple equations which primarily analyzed the difference of minorities eligible for jury duty from the actual number of minorities who served on the jury to determine if a disparity amounted to a substantial underrepresentation of minority jurors.<sup>7</sup> Because this simple method did not consider many variables in its equation, it was not as accurate as the complex statistical equations widely used today.<sup>8</sup>

The mathematical disparities that have been accepted by the Court as adequate to establish a prima facie case of purposeful discrimination range approximately from 14% to 40%.<sup>9</sup> "Whether or not greater disparities constitute prima facie evidence of discrimination depends upon the facts of each case."<sup>10</sup>

Statistical disparities in jury selection cases are not sufficiently comparable to provide a complete analogy.

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focuses on the differences caused by underrepresentation in each jury; and (4) the statistical decision theory which was fully embraced in *Castaneda v. Partida*, 430 U.S. at 496 n. 17, 97 S.Ct. at 1281 n. 17. See also Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv.L.Rev. 338 (1966).

<sup>7</sup> See *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); *Villafane v. Manson*, 504 F.Supp. at 83.

<sup>8</sup> See Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv.L.Rev. 338, 363 (1966) ("The Court did not reach these problems in *Swain* because of its inability to assess the significance of statistical data without mathematical tools.").

<sup>9</sup> *Castaneda v. Partida*, 430 U.S. at 495-96, 97 S.Ct. at 1280-82 (disparity of 40%); *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) (disparity of 23%); *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967) (disparity of 18%); *Sims v. Georgia*, 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967) (disparity of 19.7%); *Jones v. Georgia*, 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967) (disparity of 14.7%). These figures result from the computation used in *Swain*.

<sup>10</sup> *United States ex rel Barksdale v. Blackburn*, 639 F.2d 1115, 1122 (5th Cir. 1981) (en banc).

There are no guidelines in decided cases so in this case we have to rely on reason. We start with a sentencing procedure that has been approved by the Supreme Court.<sup>11</sup> The object of this system, as well as any constitutionally permissible capital sentencing system, is to provide individualized treatment of those eligible for the death penalty to insure that non-relevant factors, *i.e.* factors that do not relate to this particular individual or the crime committed, play no part in deciding who does and who does not receive the death penalty.<sup>12</sup> The facts disclosed by the Baldus study, some of which have been previously discussed, demonstrate that there is sufficient disparate treatment of blacks to establish a *prima facie* case of discrimination.

This discrimination, when coupled with the historical facts, demonstrate a *prima facie* Fourteenth Amendment violation of the Equal Protection Clause. It is that discrimination against which the Equal Protection Clause stands to protect. The majority, however, fails to give full reach to our Constitution. While one has to acknowledge the existence of prejudice in our society, one cannot and does not accept its application in certain contexts. This is nowhere more true than in the administration of criminal justice in capital cases.

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<sup>11</sup> *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

<sup>12</sup> The sentencing body's decision must be focused on the "particularized nature of the crime and the particularized characteristics of the individual defendant." 428 U.S. at 206, 96 S.Ct. at 2940. See also *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) ("the need for treating each defendant in a capital case with degree of respect due the uniqueness of the individual is far more important than in non-capital cases." 438 U.S. at 605, 98 S.Ct. at 2965); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 does focus on a characteristic of the particular defendant, albeit an impermissible one. See *infra*, p. 3.

*The Fourteenth Amendment and Equal Protection*

"A showing of intent has long been required in *all* types of equal protection cases charging racial discrimination."<sup>13</sup> The Court has required proof of intent before it will strictly scrutinize the actions of a legislature or any official entity.<sup>14</sup> In this respect, the intent rule is a tool of self-restraint that serves the purpose of limiting judicial review and policymaking.<sup>15</sup>

The intent test is not a monolithic structure. As with all legal tests, its focus will vary with the legal context in which it is applied. Because of the variety of situations in which discrimination can occur, the method of proving intent is the critical focus. The majority, by failing to recognize this, misconceives the meaning of intent in the context of equal protection jurisprudence.

Intent may be proven circumstantially by utilizing a variety of objective factors and can be inferred from the totality of the relevant facts.<sup>16</sup> The factors most appro-

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<sup>13</sup> *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982).

<sup>14</sup> *Id.* at n. 5 ("Purposeful racial discrimination invokes the strictest scrutiny of adverse differential treatment. Absent such purpose, differential impact is subject only to the test of rationality."); see also Sellers, *The Impact of Intent on Equal Protection Jurisprudence*, 84 Dick.L.Rev. 363, 377 (1979) ("the rule of intent profoundly affects the Supreme Court's posture toward equal protection claims.").

<sup>15</sup> The intent rule "serves a countervailing concern of limiting judicial policy making. *Washington v. Davis* can be understood . . . as a reflection of the Court's own sense of institutional self-restraint—a limitation on the power of judicial review that avoids having the Court sit as a super legislature. . . ." Note, *Section 1981: Discriminatory Purpose or Disproportionate Impact*, 80 Colum.L.R. 137, 160-61 (1980); see also *Washington v. Davis*, 426 U.S. 229, 247-48, 84 S.Ct. 2040, 2051, 48 L.Ed.2d 597 (1976).

<sup>16</sup> See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977).



priate in this case are: (1) the presence of historical discrimination; and (2) the impact, as shown by the Baldus study, that the capital sentencing law has on a suspect class.<sup>17</sup> The Supreme Court has indicated that:

Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly . . . where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.<sup>18</sup>

Evidence of disparate impact may demonstrate that an unconstitutional purpose may continue to be at work, especially where the discrimination is not explainable on non-racial grounds.<sup>19</sup> Table 43, *supra* p. 4, the table and the accompanying evidence leave unexplained the 20% racial disparity where the defendant is black and the victim is white and the murders occurred under very similar circumstances.

Although the Court has rarely found the existence of intent where disproportionate impact is the *only* proof, it has, for example, relaxed the standard of proof in jury

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<sup>17</sup> *Id.* See also *Rogers v. Lodge*, 102 S.Ct. at 3280.

<sup>18</sup> *Rogers v. Lodge*, 102 S.Ct. at 3280.

<sup>19</sup> In *Washington v. Davis*, 426 U.S. at 242, 96 S.Ct. at 2049, the Court stated: "It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." See also *Personnel Administrator of Mass. v. Feeny*, 442 U.S. 256, 99 S.Ct. 2282, 2296 n. 24, 60 L.Ed.2d 870 (1979) (*Washington* and *Arlington* recognize that when a neutral law has a disparate impact upon a group that has historically been a victim of discrimination, an unconstitutional purpose may still be at work).

selection cases because of the "nature" of the task involved in the selection of jurors.<sup>20</sup> Thus, to show an equal protection violation in the jury selection cases, a defendant must prove that "the procedure employed resulted in a substantial under-representation of his race or of the identifiable group to which he belongs."<sup>21</sup> The idea behind this method is simple. As the Court pointed out, "[i]f a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process."<sup>22</sup> Once there is a showing of a substantial underrepresentation of the defendant's group, a *prima facie* case of discriminatory intent or purpose is established and the state acquires the burden of rebutting the case.<sup>23</sup>

In many respects the the imposition of the death penalty is similar to the selection of jurors in that both processes are discretionary in nature, vulnerable to the bias of the decision maker, and susceptible to a rigorous statistical analysis.<sup>24</sup>

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<sup>20</sup> *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. at 267 n. 13, 97 S.Ct. at 564 n. 13 ("Because of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* [118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed.2d 220] or *Gomillion* [364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110]"); see also *International Bro. of Teamsters v. United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977) ("We have repeatedly approved the use of statistical proof . . . to establish a *prima facie* case of racial discrimination in jury selection cases.").

<sup>21</sup> *Castaneda v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.E.2d 498 (1977).

<sup>22</sup> *Id.* at n. 13.

<sup>23</sup> *Id.* at 495, 97 S.Ct. at 1280.

<sup>24</sup> Joyner, *Legal Theories for Attacking Racial Disparity in Sentencing*, 18 Crim.L.Rep. 101, 110-11 (1982) ("In many respects

The Court has refrained from relaxing the standard of proof where the case does not involve the selection of jurors because of its policy of: (1) deferring to the reasonable acts of administrators and executives; and (2) preventing the questioning of tax, welfare, public service, regulatory, and licensing statutes where disparate impact is the only proof.<sup>25</sup> However, utilizing the standards of proof in the jury selection cases to establish intent in this case will not contravene this policy because: (1) deference is not warranted where the penalty is grave and less severe alternatives are available; and (2) the court did not contemplate capital sentencing statutes when it established this policy. Thus, statistics alone could be utilized to prove intent in this case. But historical background is also relevant and supports the statistical conclusions.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of Justice."<sup>26</sup> It is the duty of the courts to see to it that throughout the procedure for bringing a person to justice, he shall enjoy "the protection which the Constitution guarantees."<sup>27</sup> In an imperfect society, one has to admit that it is impossible to guarantee that the administrators of justice, both judges and jurors, will successfully wear

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sentencing is similar to the selections of jury panels as in *Castaneda*."). The majority opinion notes that the Baldus study ignores quantitative difference in cases: "looks, age, personality, education, profession, job, clothes, demeanor, and remorse. . . ." Majority opinion at 62. However, it is these differences that often are used to mask, either intentionally or unintentionally, racial prejudice.

<sup>25</sup> See *Washington v. Davis*, 426 U.S. at 248, 96 S.Ct. at 2051; Note, *Section 1981: Discriminatory Purpose or Disproportionate Impact*, 80 Colum.L.R. 137, 146-47 (1980).

<sup>26</sup> *Rose v. Mitchell*, 443 U.S. 545, 556, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979).

<sup>27</sup> *Rose*, *supra*, 443 U.S. at 557, 99 S.Ct. at 3000.

racial blinders in every case.<sup>28</sup> However, the risk of prejudice must be minimized and where clearly present eradicated.

Discrimination against minorities in the criminal justice system is well documented.<sup>29</sup> This is not to say that progress has not been made, but as the Supreme Court in 1979 acknowledged,

we also cannot deny that, 114 years after the close of the War between the States and nearly 100 years after *Strauder* [100 U.S. 303, 25 L.Ed. 664] racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination

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<sup>28</sup> As Robespierre contended almost 200 years ago:

Even if you imagine the most perfect judicial system, even if you find the most upright and the most enlightened judges, you will still have to allow place for error or prejudice.

*Robespierre* (G. Rude ed. 1967).

<sup>29</sup> See, e.g., *Johnson v. Virginia*, 373 U.S. 61, 83 S.Ct. 1053, 10 L.Ed.2d 195 (1963) (invalidating segregated seating in courtrooms); *Hamilton v. Alabama*, 376 U.S. 650, 84 S.Ct. 982, 11 L.Ed.2d 979 (1964) (conviction reversed when black defendant was racially demeaned on cross-examination); *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969) (mass fingerprinting of young blacks in search of rape suspect overturned). See also *Rose v. Mitchell*, *supra* (racial discrimination in grand jury selection); *Rogers v. Britton*, 476 F.Supp. 1036 (E.D.Ark. 1979). A very recent and poignant example of racial discrimination in the criminal justice system can be found in the case of *Bailey v. Vining*, unpublished order, civ. act. no. 76-199 (M.D.Ga. 1978). In *Bailey*, the court declared the jury selection system in Putnam County, Georgia to be unconstitutional. The Office of the Solicitor sent the jury commissioners a memo demonstrating how they could underrepresent blacks and women in traverse and grand juries but avoid a prima facie case of discrimination because the percentage disparity would still be within the parameters of Supreme Court and Fifth Circuit case law. See notes 7-8 *supra* and relevant text. The result was that a limited number of blacks were handpicked by the jury commissioners for service.

takes a form more subtle than before. But it is no less real or pernicious.<sup>30</sup>

If discrimination is especially pernicious in the administration of justice, it is nowhere more sinister and abhorrent than when it plays a part in the decision to impose society's ultimate sanction, the penalty of death.<sup>31</sup> It is also a tragic fact that this discrimination is very much a part of the country's experience with the death penalty.<sup>32</sup> Again and as the majority points out, the new post-*Furman* statutes have improved the situation but the Baldus study shows that race is still a very real factor in capital cases in Georgia. Some of this is conscious discrimination, some of it unconscious, but it is nonetheless real and it is important that we at least admit that discrimination is present.

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<sup>30</sup> *Rose, supra*, 443 U.S. at 558-59, 99 S.Ct. at 3001.

<sup>31</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (see especially the opinions of Douglas, J., concurring, *id.* at 249-252, 92 S.Ct. at 2731-2733; Stewart, J., concurring, *id.* at 309-310, 92 S.Ct. at 2762; Marshall, J., concurring, *id.* at 364-365, 92 S.Ct. at 2790; Burger, C.J., dissenting, *id.* at 389-390 n. 12, 92 S.Ct. at 2803-2804 n. 12; Powell, J., dissenting, *id.* at 449, 92 S.Ct. at 2833).

<sup>32</sup> This historical discrimination in the death penalty was pointed out by Justice Marshall in his concurring opinion in *Furman, supra*. 408 U.S. at 364-65, 92 S.Ct. at 2790 "[i]ndeed a look at the bare statistics regarding executions is enough to betray much of the discrimination." *Id.* See also footnote 32 for other opinions in *Furman* discussing racial discrimination and the death penalty. For example, between 1930 and 1980, 3,863 persons were executed in the United States, 54% of those were blacks or members of minority groups. Of the 455 men executed for rape, 89.5% were black or minorities. Sarah T. Dike, *Capital Punishment in the United States*, p. 43 (1982). Of the 2,307 people executed in the South during that same period, 1659 were black. During the same fifty-year period in Georgia, of the 366 people executed, 298 were black. Fifty-eight blacks were executed for rape as opposed to only three whites. Six blacks were executed for armed robbery while no whites were. Hugh A. Bedau, ed., *The Death Penalty in America* (3rd ed 1982).



Finally, the state of Georgia also has no compelling interest to justify a death penalty system that discriminates on the basis of race. Hypothetically, if a racial bias reflected itself randomly in 20% of the convictions, one would not abolish the criminal justice system. Ways of ridding the system of bias would be sought but absent a showing of bias in a given case, little else could be done. The societal imperative of maintaining a criminal justice system to apprehend, punish, and confine perpetrators of serious violations of the law would outweigh the mandate that race or other prejudice not infiltrate the legal process. In other words, we would have to accept that we are doing the best that can be done in a system that must be administered by people, with all their conscious and unconscious biases.

However, such reasoning cannot sensibly be invoked and bias cannot be tolerated when considering the death penalty, a punishment that is unique in its finality.<sup>33</sup> The evidence in this case makes a *prima facie* case that the death penalty in Georgia is being applied disproportionately because of race. The percentage differentials are not *de minimis*. To allow the death penalty under such circumstances is to approve a racial preference in the most serious decision our criminal justice system must make. This is a result our Constitution cannot tolerate.

The majority in this case does not squarely face up to this choice and its consequences. Racial prejudice/preference both conscious and unconscious is still a part of the capital decision making process in Georgia. To allow this system to stand is to concede that in a certain number of cases, the consideration of race will be a factor in the decision whether to impose the death penalty. The Equal Protection Clause of the Fourteenth Amendment does not allow this result. The decision of the district court on the Baldus issue should be reversed and the state required to submit evidence, if any is available, to disprove the *prima facie* case made by the plaintiff.

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<sup>33</sup> See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

SUPREME COURT OF THE UNITED STATES

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No. 84-6811

WARREN McCLESKY, PETITIONER

*v.*

RALPH KEMP, Superintendent, Georgia Diagnostic  
and Classification Center

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ON PETITION FOR WRIT OF CERTIORARI to the United  
States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed  
herein in forma pauperis and of the petition for writ of  
certiorari, it is ordered by this Court that the motion to  
proceed in forma pauperis be, and the same is hereby,  
granted; and that the petition for writ of certiorari be,  
and the same is hereby, granted, limited to Questions 1,  
2, 3, 4 and 5 presented by the petition.

July 7, 1986